90-926

No.____

Supreme Court, U.S.
FILED
DEC 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

STATE OF MICHIGAN; and
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners-Appellants,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents-Appellees,

and

HOVER TRUCKING COMPANY OF MICHIGAN,
Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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Dated: December 7, 1990

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1990

QUESTION PRESENTED

I

Whether the Interstate Commerce Commission and the Sixth Circuit's misapplication of this Court's explicit subterfuge analysis for second state routings of intrastate freight constitutes *de-facto preemption* severely undermining Michigan's congressionally preserved right to regulate intrastate transportation by motor carriers.

LIST OF PARTIES

The parties before the United States Court of Appeals for the Sixth Circuit were:

Petitioners/Appellants
State of Michigan and Michigan Public Service Commission (Sixth Circuit No. 89-3414),
Allied Delivery System, Inc. (Sixth Circuit No. 89-3383),
and
Alvan Motor Freight, Inc.; TNT Holland Motor Express, Inc.; and Parker Motor Freight, Inc. (Sixth Circuit No. 89-3401),

Respondents/Appellees
Interstate Commerce Commission and United States of America,

Respondent/Intervenor
Hover Trucking Company of Michigan

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The State of Michigan ("Michigan") and the Michigan Public Service Commission ("MPSC") petition that a writ of *certiorari* issue to review the July 26, 1990 order and September 10, 1990 order denying rehearing of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The July 26, 1990 unreported Sixth Circuit Court decision is in *Allied Delivery System, Inc., et al v. Interstate Commerce Commission, et al.*, Case Nos. 89-3383/3401/3414 reproduced in the Appendix at pp. 1a-16a. The Sixth Circuit subsequently denied the Joint Petition for Rehearing and Suggestion for Re-

hearing En Banc in an unreported order dated September 10, 1990, reproduced in the Appendix at pp. 17a-18a.

The March 3, 1989 unreported Interstate Commerce Commission ("ICC") Order is in *Michigan Public Service Commission v. Hover Trucking Company of Michigan*, Docket No. MC-C-30092 (decision served March 13, 1989), reproduced in the Appendix at pp. 18a-31a.

JURISDICTION

Jurisdiction in this court exists by *Certiorari* pursuant to 28 U.S.C. 1254(1). Jurisdiction in the Sixth Circuit existed pursuant to 28 U.S.C. 2342(5), 2343, and 2344.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Interstate Commerce Act, 49 U.S.C. § 10101 et seq. ("ICA"), the Administrative Procedures Act, 5 U.S.C. § 706(2) ("APA"), and the Michigan Motor Carrier Act, 1933 P.A. 254, M.C.L. 475.1 et seq. ("MMCA"), relevant portions of which are reproduced in the Appendix at pp. 33a-40a.

STATEMENT OF THE CASE

A. Statutory Background

Federal statutes grant the ICC authority to regulate the legitimate transportation by motor carriers of traffic with a single state origin and destination when routed through a second state [49 U.S.C. § 10521(a)(1)(B)]. Other relevant federal statutes, however, [49 U.S.C. § 10521(b)] expressly preserves for the states regulation of intrastate transportation and prohibit fed-

eral regulations from "affecting" the ability of states to regulate intrastate transportation.

B. Proceedings Below

On March 21, 1988, the MPSC filed a complaint in the ICC against Hover Trucking Company of Michigan ("Hover") seeking a declaration that Hover's second state routing of its Michigan to Michigan freight was a subterfuge to evade Michigan regulation and in violation of § 10521(b) of the ICA.

On March 13, 1989, the ICC, based solely upon written pleadings and without benefit of oral hearings, decided that Hover's operation constituted legitimate interstate commerce and was not a subterfuge. The ICC dismissed the MPSC's complaint.

On July 26, 1990, the Sixth Circuit Court, with a partial dissent, affirmed the ICC, holding that there was no abuse of discretion by the ICC or want of substantial evidence to support the ICC's decision. On September 10, 1990, the Court denied the Petitioner's Joint Petition for Rehearing.

C. Facts Concerning Hover's Operation

Hover was established in 1958 and, for 25 years, maintained its terminal headquarters in Niles, Michigan (located in southwest Michigan along the Michigan/Indiana border). After Congress passed the Motor Carrier Act in 1980, which eased entry obstacles, Hover obtained, from the ICC, a common carrier certificate authorizing transportation of general commodities between all points in the lower 48 states.

Simultaneously with acquiring its 48-state ICC authority, in June of 1983, Hover moved its terminal headquarters from Niles, Michigan, to a facility just across the state line in South

Bend, Indiana. Immediately thereafter, in 1983 and 1984, Hover began establishing additional terminals in Michigan and today operates terminals at Jackson, Detroit, Saginaw, Pontiac, Manton, and Standish, Michigan.

After its move to South Bend, Hover radically altered its Michigan service and began actively soliciting Michigan intrastate traffic for which it possessed no MPSC authority. In soliciting this freight regardless of its origin and destination, Hover claimed that by moving it across the state line for consolidation at South Bend, the intrastate freight was "transformed" into interstate traffic, which could be handled pursuant to its ICC certificate.

The Michigan to Michigan freight handled by Hover, which is allegedly routed through South Bend, covers the entire lower peninsula of Michigan. When Hover's Michigan traffic is routed through South Bend, it is forced to circuitously travel double the number of miles (or more) on each of its shipments from the respective Michigan origin terminal to South Bend, and then back to the respective Michigan destination terminal which adds anywhere from 224-468 additional wasteful miles to each shipment.

Although Hover's "subterfuge" and corresponding evasion of state regulatory authority were the gravamen of the ICC complaint below, there is an overriding and vastly more important issue at stake here that is of *constitutional* dimension: Whether the ICC exceeded the authority that Congress, pursuant to Article I, Section 8 of the Constitution, delegated to it in the ICC's jurisdictional statute, 49 U.S.C. § 10521, to regulate interstate transportation. Further, whether the ICC ignored the policy of cooperation with state transportation administrators that Congress explicitly adopted in 49 U.S.C. § 10101(a)(5). And, finally, whether the ICC's decision directly conflicts with prior relevant precedent of this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW DIRECTLY CONFLICT WITH CONTROLLING PRECEDENT OF THIS COURT THEREBY UNDERMINING THE CONGRESSIONALLY PRESERVED RIGHT OF STATES TO REGULATE INTRASTATE COMMERCE.

The thrust of the complaint filed with the ICC below is that a motor carrier may not use its interstate operating authority to evade legitimate state regulation of intrastate transportation. This underlying principle is derived from this Court's holding in *Eichholz v. Public Service Comm. of Missouri*, 306 U.S. 268 (1939), in which the Court confronted a situation wherein a motor carrier was shipping freight between two points in Missouri via a terminal in another state.[1] The Missouri Commission contended that such shipments constituted intrastate commerce. In its review, this Court held:

> "If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the state's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint." 306 US 268, 274.

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[1] The motor carrier operator, Mr. Frank Eichholz, operated in Missouri, Kansas and Iowa, maintaining terminals in St. Louis, Missouri, Kansas City, Kansas and other terminals in Kansas and Iowa. 306 U.S. 268, 270. The shipments protested by the Missouri Commission involved shipments between St. Louis and Kansas City, Missouri via Kansas City, Kansas.

Under the facts in *Eichholz*, this Court concluded that such shipments were not made in good faith but were really a subterfuge to evade Missouri jurisdiction.

The basic principle of *Eichholz* was reaffirmed by this Court in *Service Storage & Transfer v. Virginia*, 359 U.S. 171 (1959). *Service Storage* involved a trucking company, who pursuant to an interstate certificate, transported freight between various points in Virginia by routing the freight through a West Virgina terminal prior to delivery. The Virginia Commission found the routes employed by Service Storage through West Virginia were a subterfuge to evade state law. On review, this Court reversed and held as follows at 359 U.S. at 175:

> "The Commonwealth's criminal case is bottomed on shipments, the origin and final destination of which are in Virginia. While it stipulated that all of the shipments were routed through Bluefield, West Virginia, and were, therefore, on their face interstate shipments.[3] Virginia takes the position that they were clearly intrastate in character because had they been moved over direct routes none would ever have left the Commonwealth. It contends that petitioners' circuitous and unnecessarily long routes were a mere subterfuge to escape intrastate regulation and evade its jurisdiction. . . . However, it [Virginia] offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia.

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[3]

49 U.S.C. § 303(a)(10) defines 'interstate commerece as including commerce . . . between places in the same state through another state, . . .' 544."

Service Storage also removed the right of Petitioners to initiate state actions against carriers, challenging second state routings of intrastate freight and instead required all future challenges to be filed exclusively in the ICC, 359 U.S. at 177-179.

The Court in *Service Storage* also held that "direct evidence of bad faith,"[2] on the part of a carrier in moving its intrastate traffic through a second state, would establish that the routing was "a mere subterfuge to escape intrastate regulation and evade its jurisdiction," 359 U.S. at 175. In *Service Storage*, however, this Court found no direct evidence of bad faith, in lieu of which they determined the ICC must analyze factors such as circuity, operational efficiency, and the relation of the traffic at issue to that of the carrier's overall operation, in deciding such cases.

Subsequently, the ICC, in numerous decisions, and without exception, followed *Service Storage* and in its 1971 decision in *Pennsylvania Public Utility Commission v. Arrow Carrier Corp*, 113 M.C.C. 213 (1971), *aff'd sub nom Pennsylvania Public Utility Comm v. United States*, 1973 Fed Carr Cas (CCH) 56,206 (M.D. Pa 1973) *aff'd per curiam*, 415 U.S. 902 (1974), actually incorporated these factors into a test providing that where there was no direct evidence of bad faith, the ICC would conduct a three-part "bad faith" proxy analysis of the circuity, operational efficiency and dominance of the traffic involved in a challenged routing.

In the instant case, however, the ICC was confronted with overwhelming "direct evidence of bad faith"[3] that should have left it no choice, when properly applying *Service Storage*, but to find Hover's operation to be a subterfuge. Instead, the ICC issued a decision in direct conflict with *Service Storage*, holding

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[2]

Examples of the factors enunciated by the Court in establishing direct evidence of bad faith are the length of time the out-of-state terminal existed in the carrier's operation; and the length of time the carrier has held authority from the ICC authorizing its operations. 359 U.S. at 177.

[3]

In the proceedings below, Petitioners set forth no less that 17 separate factors which established overwhelming "direct evidence of bad faith", including those types of "bad faith" factors described in *Service Storage*.

that despite the overwhelming evidence of bad faith, "motivation is not relevant." ICC decision page 7. (Appendix p. 2a).

This conclusion by the ICC was arbitrary, an abuse of discretion, in excess of statutory jurisdiction, and unsupported by substantial evidence thus clearly warranting reversal by the Court below.[4] Incredibly, however, the majority was merely "given pause"[5] by this ICC finding, but did not find it to be reversible error.[6]

The decisions below are equally deficient on the circuity question. It is undisputed that in discussing circuity, this Court in *Service Storage*, just as in *Eichholz*, addressed only that intrastate traffic which Service Storage routed through the second state. It did *not* take into consideration other traffic origined from or destined to points outside of the single state because it recognized the only way to properly determine circuity was to

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[4]

The litany of bad faith factors present in this case are "dispositive" with regard to Hover's subterfuge operation. For the Court below to affirm the ICC was in clear violation of the review standard set forth in the Administrative Procedures Act, 5 U.S.C. § 706(2) (Appendix p. 38a), requiring the Court to set aside the ICC's decision, or at the very least, remand the case to the ICC for a proper analysis of Hover's "bad faith."

[5]

At pages 4-5 of its decision below (Appendix pp. 8a-9a), the Court stated: *"We are given pause by the ICC's assertion in this Court that 'motivation is not relevant* here because the criteria set forth in *Arrow, supra*, have been met.' *. . . Discussion of the 'direct evidence' that was offered to show subterfuge or bad faith probably leaves something to be desired*, but it was within the Commission's province to find, as it did, that the fact that Hover had admittedly engaged in illegalities was not dispositive." (Emphasis supplied).

[6]

Circuit Judge Wellford on the other hand, in the dissenting portion of his opinion, did in fact properly find considerable error by the ICC in reaching this decision and thus would have recommended remand on this all-important question of "direct evidence of bad faith." (Appendix pp. 15a-16a).

calculate the difference between the direct movement and the movement via the second state.

Subsequently, the ICC, without exception, properly applied the circuity analysis in the manner devised in *Eichholz* and *Service Storage*, until its decision below. In the instant case, the ICC created a wholly new circuity test whereby, rather than compare the direct route of the intrastate traffic versus the out-of-state route, it would consider any other traffic that continued to move beyond the second state terminal thus artificially diluting the circuity factor.[7]

The ICC's new circuity factor analysis, as affirmed by the Court below, is non-sensical and yields inconsistent and inequitable results. The new, broader circuity factor analysis considers *all* the traffic mileage involving freight moving in and out of Hover's Michigan terminals to or from *all* points on Hover's system. This new approach reduces the circuity analysis to a meaningless test, resulting in disparity, and the undermining of state regulatory authority over intrastate motor carrier transportation.[8] Clearly such an analysis automatically favors larger

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[7]

The degree of circuity involved in Hover's Michigan to Michigan operations pursuant to methodology established in *Service Storage* was 92%. However, the ICC and the Court below found the appropriate circuity factor to be 24.2%. The rationale for the ICC's finding of the 24.2% circuity factor was confined to a single footnote which said: "This figure takes into account all traffic moving to and from defendant's Michigan terminals (including traffic with origins or destinations outside Michigan)." [ICC decision p. 6 (Appendix p. 27a)].

[8]

This new circuity factor analysis will greatly facilitate the dismantling of state regulation over intrastate motor carrier transportation. Every Michigan motor carrier, regardless of its geographic location, will be entitled to evade MPSC regulation by merely crossing the state line with its Michigan to Michigan shipments, regardless of the thousands of additional miles incurred. From a public policy standpoint such a result is hardly desirable since no amount of "competition" seems worth the excessive use of fuel and unnecessary use of the highways, especially in the midst of revived fuel supply, and price concerns.

motor carriers especially those having terminals in far away destinations. A few trips across the country would considerably soften any excess mileage incurred in shipping between two Michigan destinations via a terminal just across the Michigan state line. Therefore, the ICC's new analysis is nothing more than a sliding standard, altogether dependent on how extensive a motor carrier's operation is. Thus, on its face, the new circuity analysis is unreasonable. Moreover, the new circuity analysis compounds the injury to the MPSC since it improperly shifts the focus from, and virtually ignores, the very gravamen of Michigan's ICC complaint (i.e. Hover's Michigan to Michigan shipments via South Bend terminals are undertaken as a means to evade Michigan jurisdiction).

The ICC failed to provide a reasoned explanation for its departure from the long-standing precedent established for determining circuity, as required by this Court in *Atchison, Topeka and Santa Fe RR Co. v. Witchita Board of Trade*, 412 U.S. 800 (1973). The Court below also erred by failing to address the circuity question independently or the ICC's misapplication of the circuity test established in *Eichholz* and *Service Storage*.

In *Service Storage*, this Court determined the "clear meaning" of the statutory provision classifying second state routings of single state freight. As such, the ICC and the Court below were precluded from reinterpreting that provision in a contrary manner. As this Court has recently held in *Maislin Industries U.S., Inc., v. Primary Steel, Inc.*, ____ U.S. ____; 110 S. Ct. 2759; 111 L.Ed. 2d 94, 111 (1990):

> "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."

Because this Court has restricted petitioners to presenting these types of challenges exclusively in the ICC, the ICC must be bound by this Court's landmark precedent on this issue. The ICC cannot be allowed to ignore this Court's mandates, at the expense of the congressionally preserved right of states to regulate legitimate intrastate commerce. Thus, the decisions below must be reversed.[9]

II. THE DECISIONS BELOW IGNORE THE MANDATE OF CONGRESS WHICH HAS PRESERVED STATE JURISDICTION OVER INTRASTATE MOTOR CARRIER TRANSPORTATION AND RESULTS IN DE-FACTO PREEMPTION OF MICHIGAN'S INTRASTATE MOTOR CARRIER REGULATION

Congress, in the 1935 Motor Carrier Act and in 1980 amendments thereto, mandated that the State's authority to regulate intrastate motor carrier transportation be preserved. The 1935 Act, P.L. 74-225, as amended in 1980, 49 U.S.C. § 10521(a)(1)(B), 1980 P.L. 96-296, (Appendix p. 34a), confers upon the ICC the statutory authority to regulate the transportation of property between "a state and another place in the same state through another state." However, while § 10521(a)(1)(B) may confer ICC jurisdiction over Michigan to Michigan transportation of property conducted by Hover via its South Bend facility, § 10521(b) (Appendix p. 35a) restricts the ICC's authority by providing that "this subtitle does not" . . . *"affect the power of a state to regulate intrastate transportation provided by a motor carrier"* (emphasis supplied).

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[9]

See *California v. FERC*, 495 U.S. ____; ____, 109 L. Ed. 2d 474, 110 S. Ct. ____ (1990), recognizing the respect "this Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes".

In enacting § 10521(b), Congress specifically sought to avoid state/federal conflicts concerning the regulation of motor carriers, and to prevent federal infringement or usurpation of state motor carrier regulation. Also, while the 1980 amendments to the Act largely deregulated interstate motor carrier transportation, the amendments did not change Congress' original mandate to preserve state regulation. Indeed it specifically withheld from the ICC any power to deregulate intrastate transportation, or to otherwise interfere with such state regulation. This conclusion is underscored by Congress' policy objectives in the 1980 Act, stated in 49 U.S.C. § 10101(a)(5) (Appendix p. 33a): "It is the policy of the United States Government . . . to cooperate with each State and the officials of each State on transportation matters."

Petitioners submit that the ICC and the Court below mistakenly assume that because interstate operations were largely deregulated in 1980, prior relevant statutory provisions and judicial precedents are no longer viable. Recently, however, this Court addressed that very question in *Maislin (supra)*, and held to the contrary stating:

> "The ICC maintains, however, that the passage of the Motor Carrier Act of 1980 (MCA) . . . justifies its Negotiated Rates policy. The MCA substantially deregulated the motor carrier industry in many ways in an effort to 'promote competitive and efficient transportation services.' . . . *We reject this argument. Although the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, . . . it does not have the power to adopt a policy that directly conflicts with its governing statute. . . . Generalized congressional exhortations to "increase competition" cannot provide the ICC authority to alter the well-established statutory . . . requirements.*" (Emphasis supplied). (111 L.Ed. 2d at 112-113).

Because the ICC's findings and the Sixth Circuit's affirmance thereof constitute decisions which, in principle, directly conflict with the ICC's governing statute [10521(b)], a reversal is equally compelling here.

This Court has, on numerous occasions, preserved state jurisdiction from efforts to preempt state authority in analogous situations where Congress provided for dual state/federal regulatory jurisdiction. For example, in *Louisiana Pub. Service Comm. v. FCC*, 476 U.S. 355, (1986), this Court struck down a decision of the Federal Communications Commission ("FCC") which sought to require State regulatory commissions to use the FCC-established depreciation schedules applicable to interstate telephone equipment and service to determine depreciation for intrastate equipment and service. The FCC had determined that its new depreciation schedules were necessary to support its policy goals of promoting competition in the industry, and that such FCC-mandated schedules were to be applied at both Federal and State levels to ensure against State actions which would "frustrate the accomplishment of that policy." 476 U.S. at 364.

Noting Congressional intent to preserve state regulatory jurisdiction over intrastate telecommunications [as stated in Section 1(b) of the Federal Communication Act of 1934, 47 U.S.C. § 152(b)], this Court rejected the FCC's argument that the agency could preempt State regulation to "effectuate a federal policy," particularly in the absence of specific Congressional authority to take preemptive action. *Id.* at 385. In so holding, the Court extensively reviewed the preemption tests, holding that "The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law," *Louisiana*, 476 U.S. at 368, and that "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority." Furthermore, "an agency literally has no power to act, let alone pre-empt . . . unless and until Congress confers power upon it,"

and it "may not confer upon itself power" or "expand its power in the face of a congressional limitation on its jurisdiction." 476 U.S. at 374. Similarly, this Court has repeatedly rejected claims in other cases that certain aspects of State regulation of utilities and motor carriers were implicitly preempted or otherwise curtailed by various Federal programs.[10]

Louisiana and other cases applies with equal force to the ICC in this case. Just as 47 U.S.C. § 152(b) denied the FCC authority to regulate "intrastate communication service by wire" (476 U.S. at 365-368), 49 U.S.C. § 10521(b) denies the ICC the authority to use the ICA to "affect the power of a State to regulate intrastate transportation provided by a motor carrier." Both Congressional denials are clearly and categorically stated; neither provides any exceptions to permit the voiding or restricting of state law or regulations. Thus, the ICC and the Court below *may not*, consistent with Congressional intent, redefine "interstate" traffic in such a way that State regulation of intrastate traffic becomes an empty and meaningless shell, particularly when that redefinition is contrary to previous ICC as well as judicial precedent.

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[10]

Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48 (1985)v (State decisions to accept collective intrastate motor carrier rate proposals do not violate federal antitrust laws in the absence of Congress' explicit intention to limit State regulation of intrastate commerce); *Arkansas Electric Coop. Corp. v. Arkansas Pub. Service Comm.*, 461 U.S. 375 (1983) (State regulation of rural electric generating and transmission cooperatives not implicitly preempted by Federal loan requirements for REA borrowers); *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Comm.*, 461 U.S. 190 (1983) (State moratorium on new nuclear power plant construction not implicitly preempted by Federal regulation of nuclear plant safety); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) (State regulation of the acquisition of securities of State-chartered corporations not preempted by Federal securities laws); *Northwest Central Pipeline Corp. v. Kansas*, 489 U.S. 493 (1989) (State regulation of the production and gathering of natural gas not preempted by Federal Natural gas Act, 15 U.S.C. § 717 et seq.). Such cases document the Court's general reluctance to uphold claims voiding state law and regulation where Congress has not explicitly ordained such result.

Despite the exhaustive arguments presented by the Petitioners indicating that § 10521(b) prohibited the ICC from "affecting a state's ability to regulate intrastate transportation" the Court below gave short shrift to these critical arguments.[11] It was error for the Court below, in the face of the express language of § 10521(b), to conclude that Petitioners did not present "statutory support" for the proposition that the ICC cannot interfere with the state's right to regulate intrastate transportation.

Since the ICC's decision below, Michigan carriers are strongly encouraged to set up Hover-type operations, which will result in the wasteful use of Michigan highways and resources and in the increasing diversion of freight from legitimate intrastate carriers. Before long, most large carriers providing Michigan to Michigan service will have no choice but to establish terminals just across the Michigan state line if they are to withstand the predatory pricing tactics of Hover-type carriers. Within a short period of time, Michigan's system of intrastate regulation of motor carriers will be obliterated. Eventually, only the largest interstate carriers will survive and all other small carriers operating in Michigan, and in all other states, will be forced into bankruptcy. Further, even if Hover and the other carriers are *actually* transporting freight via the extremely circuitous routes (which is often not the case because many of these carriers will illegally move freight direct so as to avoid the wasteful expense), the adverse impact and increased traffic on Michigan highways is inconsistent with the purposes of the MMCA.

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[11]

At pages 4-5 of its decision below (Appendix p. 5a), the Court held: "The PSC has presented neither caselaw nor statutory support for the proposition that the statute permits the ICC to regulate the transportation described in § 10521(a)(1)(B) only so long as it does not interfere with a state's regulation of intrastate transportation. The ICC was well within its jurisdiction."

49 U.S.C. § 10521(a)(1)(B)'s classification of second state routings of single state freight as interstate, was intended to cover situations involving little or no circuity whatsoever.[12] Not until Hover, did a carrier devise that such a routing could be employed to cover freight origined to or destined from the *entire* bordering state. Very simply, Hover saw a loophole and took advantage of it. Rather than close the loophole, however, the decisions below condoned Hover's operation, thereby sending the message to the motor carrier industry that intrastate authority was no longer necessary.

The peninsular geography of Michigan, in particular, requires Hover-type carriers to travel several hundred additional circuitous miles when engaging in second state routings of Michigan freight. Hover itself must travel an astounding 224-468 *additional* wasteful miles for each shipment, in evasively moving its Michigan freight between its seven Michigan terminals and its South Bend terminal. Adding to this, the numerous other carriers currently known to be engaging in or setting up Hover-type operations in Michigan, this figure could quickly escalate to millions of circuitous wasteful miles clogging up Michigan's highways and wasting resources.

At the same time, however, many of these carriers may be tempted to not *actually* engage in this grossly wasteful routing. Instead, they may "claim" to be routing freight through a second state, but in fact do not just as Hover admitted doing in this proceeding.[13] Thus carriers may then move the intrastate

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[12] This provision was intended to allow an interstate carrier located in D.C., for example, to also handle freight under its interstate authority that was origined or destined to proximate second state points like Alexandria or Arlington, Virginia.

[13] Hover generated false documents reflecting an Indiana routing of all its Michigan freight much of which, Hover later admitted, *never left Michigan.*

freight direct without having to obtain intrastate authority. While Michigan can try to catch these carriers, it is an extremely complicated and time consuming enforcement task.

The decisions below directly undermine the MPSC's valid regulation of intrastate motor carrier transportation, as mandated by state legislation for important public purposes, including *inter alia*, protecting public safety, conserving the highways, and promoting fair competition. These public purposes promoted by the MMCA are furthered by amendments enacted in 1982 (1982 P.A. 399, M.C.L. 475.1 *et. seq.*), which provide for new, eased entry standards, increased rate flexibility, and other reforms to increase competition in the Michigan motor carrier industry, while retaining some measure of regulatory control over routes, rates, and operations to promote safety, conservation of highways, etc.

Hover-type carriers establish Michigan terminals, serve Michigan shippers, use Michigan highways, and consume Michigan resources, yet merely based on evasive and circuitous routings, the decisions below conclude that Michigan has no jurisdiction whatsoever to regulate or control these pervasive Michigan operations.

Legitimate intrastate carriers must apply for MPSC authority, demonstrate a public need, prove that new service won't endanger the ability of present carriers to operate or conflict with the purposes of the MMCA. Hover and Hover-type carriers, on the other hand, pursuant to the decisions below, can now invade Michigan and conduct unrestricted, discriminatory, predatory operations to the severe detriment of, and in total disregard, for Michigan's carefully crafted system of motor carrier regulation. Michigan must be given the right to regulate and control such extensive intrastate operations if its congressionally preserved right of regulation is to be upheld.

The only way that Michigan can curb the onslaught of Hover-

type operations is for the State to deregulate intrastate motor carrier transportation just as the Congress has done for interstate. However, despite the push for deregulation over the past several years, Michigan has rejected taking that approach since it perceives a failure of deregulation at a federal level.[14]

Accordingly, the ICC should not be allowed to extinguish the State's ability to regulate intrastate commerce which is expressly protected by Congress pursuant to § 10521(b).

III. ALTERNATIVELY, THIS COURT SHOULD REMAND THIS CASE AS SUGGESTED IN THE SEPARATE CONCURRING/DISSENTING OPINION OF JUDGE WELLFORD BELOW WHO PROPERLY DETERMINED THAT THE ICC'S GLARING ERRORS WITH REGARD TO "CIRCUITY" AND "BAD FAITH" WARRANTED A REMAND

The MPSC's arguments for certiorari are consistent with portions of the separate concurring/dissenting opinion below of Judge Wellford.[15] Judge Wellford, unlike the majority of the Court below, saw the clear error in the ICC's reasoning and conclusions. Thus, Petitioners submit that had the majority properly analyzed these issues, it would have arrived at the same result.

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[14]

Since interstate deregulation in 1980, there has been a conglomeration and merger among LTL carriers in order to survive that has resulted in approximately 60 percent of the interstate freight and 90 percent of the revenues being handled by the top 10 carriers; there has also been a deterioration in safety; a high number of business failures; inadequate service; discriminatory pricing; and a deterioration of labor/management relations. Dempsey, Paul S., Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition, 1988, pp 53-56. See also, Transportation Law Journal Vol. XVII No. 1 1988, Dempsey, Paul S., The Empirical Results of Deregulation: A Decade Later, and the Band Played On.

IV. THE DECISION BELOW DOES NOT CONSIDER THE CLEAR ERRORS COMMITTED BY THE ICC, INCLUDING REFUSAL TO GRANT FORMAL EVIDENTIARY HEARINGS IN THIS CASE

The decision below also failed to consider an additional critical argument raised by Michigan and the MPSC in its brief on appeal, namely, that Petitioners were denied due process by

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[15]

As to the circuity issue, at pages 4-5 (Appendix pp. 12a-13a), Judge Wellford indicates:

> "I have concern, however, with respect to the conclusion reached by the ICC that the circuity factor 'does not play a major role' in the evaluation process of whether or not subterfuge is present. . . . It was described as a 'significant' factor in *Pennsylvania PUC v. Arrow Carrier Corporation* (citation omitted). *I agree with this description and would hold that, in a case of this nature, the factor of circuity is substantial and must be given full consideration, together with the other factors herein discussed, in determining the question of bad faith or subterfuge.* I would, then, remand this matter to the ICC for reconsideration of the question of circuity as having a significant role rather than denigrating as 'not a major' one. I would expect also that upon remand ICC would explain its rationale for its new approach in calculating the degree of circuity in order to demonstrate that its methodology on circuity is not arbitrary and capricious but rather, rational." (Emphasis supplied).

As to the "bad faith" issue, at page 8 (Appendix pp. 15a-16a), Judge Wellford indicates:

> "I am at a loss to understand this part of the ICC's conclusions in this controversy. Evidence of bad faith is, indeed, highly relevant to any ultimate determination of subterfuge to circumvent legitimate state regulation. I am aware that in another part of the ICC opinion at issue, the Commission finds that the Van Bokkem statement 'does not form any basis . . . to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation.' Id. Absent the conclusion that 'motivation is not relevant,' perhaps the ICC has chosen a rational explanation for Van Bokkem's admission. *I am persuaded, however, that there should be a remand to the ICC for a clear explanation of its rationale concerning the alleged 'bad faith' actions of Hover which, are the focus of much of Petitioners arguments, recognizing that 'no single factor' is controlling.*" (Emphasis supplied).

the ICC's refusal to formulate an evidentiary record based upon a formal hearing.

When the MPSC originally filed its Complaint against Hover, it requested the ICC to convene a full evidentiary hearing, similar to that previously afforded by the ICC in cases of this type. The ICC denied the request, its sole rationale being that "[I]t is not likely that disposition of the issues in this proceeding will depend upon disputed evidence." (ICC decision dated May 12, 1988, Appendix pp. 31a-32a). But the ICC decison *did, in fact, depend on disputed evidence.*

The Administrative Procedures Act ("APA"), 5 U.S.C. § 554(a)(1) (Appendix pp. 35a-36a), provides for adjudication, "to be determined on the record after an opportunity for an agency hearing." In *Marathon Oil v. Environmental Protection Agency,* 564 F.2d 1253 (9th Cir. 1977), the Ninth Circuit considered whether applicants were entitled to formal hearings that adhere to the requirements of 5 U.S.C. §§ 554, 556, and 557 (Appendix pp. 35a-37a). In its reasoning, the court noted in considering the applicability of the APA that "Congress recognized that certain administrative decisions closely resemble judicial determinations and in the interest of fairness require similar procedural protections." *Id.* at 1261. An order of an administrative agency adjudicating rights or directing someone to do or refrain from doing something must be based on a hearing after due notice. *Hoxsey Cancer Clinic v. Folsom,* 155 F.Supp 376 (D. D.C. 1957).

The ICC's acceptance of and reliance upon the unsupported and baseless statistics provided by Hover and contested by Michigan, along with the ICC's rejection of Michigan's thorough factual filings, foreclosed effective judicial review of the agency's final decision according to the arbitrary and capricious standard "of the APA." *US Lines v. Federal Maritime Comm.,* 584 F.2d 519, 541 (D.C. Cir. 1978)v; see also 5 U.S.C. § 706(2)(A) (Appendix p. 38a). In addition, the APA clearly con-

templates that a reviewing court must determine whether an agency has complied with applicable procedural requirements in reaching its decision. Michigan urges that the ICC's failure to provide even the rudiments of a hearing and fair procedures established that the ICC's order herein was clearly reached "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

CONCLUSION

The decisions below dismantle Michigan's and the several states' ability to effectively regulate intrastate transportation provided by motor carriers and all but ignore the fact that regulation of motor carriers, as envisioned by Congress, is a *dual* (federal-state) regulatory scheme. As such, the decisions below result in the *de facto* preemption of Michigan laws regulating motor carriers. Through an expansive reading of its own powers, the ICC has contravened controlling precedent of this Court and the plain meaning of 49 U.S.C. § 10521(b).

PRAYER FOR RELIEF

WHEREFORE, this Court should grant certiorari to review the decisions of the ICC and the United States Court of Appeals for the Sixth Circuit and these decisions should be vacated, or in the alternative, this case should be remanded to the

ICC, as was recommended by Circuit Judge Wellford in his separate opinion below.

Respectfully submitted,

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Dated: December 7, 1990

APPENDIX

APPENDIX

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APPENDIX

NOS. 89-3383/3401/3414

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALLIED DELIVERY SYSTEM, INC.;

(89-3383)

ALVAN MOTOR FREIGHT, INC.; TNT HOLLAND MOTOR EXPRESS, INC.,; AND PARKER MOTOR FREIGHT, INC.,

(89-3401)

and

STATE OF MICHIGAN; and MICHIGAN PUBLIC SERVICE COMMISSION,

(89-3414)

Petitioners-Appellants,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents,

HOVER TRUCKING COMPANY OF MICHIGAN,

Respondent-Intervenor.

NOT RECOMMENDED FOR FULL TEXT-PUBLICATION
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ON PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

Decided and Filed July 26, 1990

BEFORE: **WELLFORD** and **NELSON**, Circuit Judges, and **EDWARDS**, Senior Circuit Judge.

PER CURIAM. The petitioners, several intrastate Michigan trucking companies and the state agency regulating such carriers, seek review of an Interstate Commerce Commission decision holding that because certain Michigan-to-Michigan traffic of respondent Hover Trucking Company is routed through a terminal in Indiana, the traffic is interstate transportation subject to regulation only by the ICC. Finding no abuse of discretion or want of substantial evidence to support the ICC's decision, we shall deny the petitions for review.

I

For 25 years, Hover Trucking Company of Michigan had its headquarters and only terminal in Niles, Michigan, near the Indiana border. Operating under regulatory authorization from the Michigan Public Service Commission ("PSC"), Hover functioned mainly as a local connecting line for interstate carriers in southwest Michigan and northern Indiana.

Hover began to expand its operations in 1979, after coming under new ownership, and it received expanded authorizations from the PSC and the ICC. In 1982 Hover established a terminal in Grand Rapids, Michigan. Again it received the requisite expanded authorization from the PSC.

Hover acquired a 48-state authorization from the ICC in 1983, at which time the company moved its headquarters to a larger facility in South Bend, Indiana. Hover's president told a newspaper reporter that the move to South Bend would enable the company to serve Michigan customers without obtaining authority from the PSC. Hover subsequently moved into an even larger terminal in South Bend, and added additional "satellite" terminals in Michigan.

Hover now operates 25 terminals in Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan. The South Bend terminal serves as a break-bulk terminal, or "hub." Freight is collected and consolidated at Hover's "satellite" terminals, shipped to the South Bend terminal for sorting, and then shipped to a satellite terminal near its destination. Under this system some shipments from one point in Michigan to another point in Michigan are routed through South Bend.

Concerned that Hover was soliciting intrastate shipments in Michigan for which it had no authority, the PSC investigated Hover in 1987. The president of Hover claimed that only shipments made under PSC authority went directly between points in Michigan without passing through the Indiana terminal. However, evidence revealed that this was not invariably the case, and some shipments that purportedly went through the South Bend terminal actually never left Michigan. Hover stipulated that such shipments occurred during 1986 without PSC intrastate authorization, and the company agreed to cease those activities. There is no evidence that such shipments continued thereafter.

Nevertheless, believing that Hover's shipments through South Bend were merely a subterfuge to avoid state regulation, the PSC filed a complaint against Hover with the ICC, seeking to stop Hover's service between points in Michigan even if routed through Indiana. The complaint alleged that Hover routed its Michigan-to-Michigan shipments through South Bend in bad faith, that Hover did not have a legitimate business purpose for routing such shipments through South Bend, that the routings were unnecessarily circuitous, and that the "intrastate" traffic routed through South Bend was not incidental to Hover's interstate operations. Petitioners Allied Delivery Systems, Inc., Alvan Motor Freight, Inc., TNT Holland Motors Express, Inc., and Parker Motor Freight, Inc., all of which claimed to have lost intrastate business to Hover, joined the challenge to Hover's operations.

The ICC found that Hover's shipments from points in Michigan through South Bend to other points in Michigan represented interstate commerce not subject to PSC regulation. In determining that Hover's operations were not a "subterfuge" to avoid intrastate regulation, the Commission found that: (1) the interstate routing of Hover's shipments was not unduly circuitous when compared with the routes of intrastate carriers; (2) there was economic justification for such routing apart from Hover's lack of intrastate authority; and (3) the traffic that would otherwise be intrastate was a small proportion of Hover's overall operations.

II

Congress gave the ICC jurisdiction over interstate transportation, 49 U.S.C. § 10521(a), but forbade it in most cases to regulate intrastate transportation. 49 U.S.C. § 10521(b). Congress also expressed a desire that the ICC cooperate with the states in regulating transportation. 49 U.S.C. § 10101(a)(5).

The statute defines neither "interstate" nor "intrastate" commerce. See 49 U.S.C. § 10102. The pre-1978 version of the Interstate Commerce Act, however, defined "interstate commerce" as "commerce between any place in a state and any place in another state or between places in the same state through another state." 49 U.S.C. § 303(a)(10)(repealed). Congress deleted this definition when it revised the Act in 1978, but incorporated identical language in the section delineating the ICC's jurisdiction:

> "[T]he Interstate Commerce Commission has jurisdiction over transportation by motor carrier. . .
> (1) between a place in —
> (A) a state and a place in another state;
> (B) *a state and another place in the same state through another state;* . . . ."

49 U.S.C. § 10521(a) (emphasis added). See also H.R.Rep. No. 1395, 95th Cong., 2d Sess. 219 (1978) (Master Disposition Table showing that § 303(a)(10) was incorporated into § 10521), *reprinted in* 1978 U.S.Code Cong. & Admin. News 3009, 3228, and *table reprinted in* 49 U.S.C.A. Suppl. 816, 821 (1990); H.R. Rep. No. 1395 at 247 (table of Laws Omitted and Repealed indicating that the definition of "interstate operation" contained in § 303(a)(20) was deleted as "unnecessary" because "[t]he chapter on jurisdiction [§§ 10521 *et seq.*] specifies what is meant by interstate commerce"), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3009, 3256, and *table reprinted in* 49 U.S.C.A. Suppl. 848, 849 (1990). The PSC has presented neither caselaw nor statutory support for the proposition that the statute permits the ICC to regulate the transportation described in § 10521(a)(1)(B) only so long as it does not interfere with a state's regulation of intrastate transportation. The ICC was well within its jurisdiction.

III

The decision of the Commission should not be set aside by this court unless it is unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A) and (E). As this court has explained:

> "If the agency considers the relevant factors and articulates a rational connection between the facts found and the choice made, the decision is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and will be upheld if supported by substantial evidence." *Film Transit, Inc. v. ICC*, 699 F.2d 298, 300 (6th Cir. 1983), citing *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

As discussed above, it is clear that transportation beginning and ending in the same state but passing through another is

interstate commerce. It is equally clear, however, that a carrier may not in "bad faith" use interstate routings as a "subterfuge" to avoid state regulation. *Pennsylvania Public Utility Com'n v. Arrow Carrier Corp.*, 113 M.C.C. 213, 219 (1971) ("*Arrow*"), *aff'd sub nom. Pennsylvania Public Utility Com'n v. United States*, 1973 Fed. Carr. Cas. (CCH) ¶ 56206 (M.D.Pa. 1973), *aff'd per curiam*, 415 U.S. 902 (1974). *Accord, Gray Lines Tour Co. of Southern Nevada v. ICC*, 824 F.2d 811, 814 (9th Cir. 1987).

The petitioners in the case at bar charge that Hover uses its South Bend terminal in bad faith to avoid state regulation of Michigan-to-Michigan freight, thereby allowing it to offer lower rates than those established by the PSC for intrastate transportation. The complainant has the burden of proof on such an issue, of course. *Missouri Public Service Com'n v. Missouri Arkansas Transp. Co.*, 103 M.C.C. 641, 649 (1967).

As the Commission has observed, "[f]ixing the line between a legitimate interstate operation and a bad faith scheme to avoid state regulation has always been a difficult task." *Arrow*, 113 M.C.C. at 221. The efficiency of an operation is not controlling, but it does shed light on a carrier's *bona fides*. *Service Storage and Transfer Company, Inc. v. Virginia*, 359 U.S. 171, 176 (1959). Recognizing this, the Commission will usually test good faith by examining the efficiency or reasonableness of the carrier's actions:

> "The Commission and the courts, in most cases involving an alleged subterfuge, will compare the efficiency of the direct and the circuitous routes. Such a comparison is not the sole test of good faith. *Service Storage and Transfer Company, Inc. v. Virginia*, [359 U.S. 171, 176 (1959)]. However, it is usually the best indicator of the carrier's intent because without some compelling reason, a carrier would normally seek and use the most efficient routes available." *Rock Island Motor Transit Co. v. Watson-Wilson*

Transp. System, Inc., 99 M.C.C. 303, 307 (1965), *aff'd sub nom. Rock Island Motor Transmit Co. v. United States*, 256 F.Supp. 812 (S.D. Iowa 1966).

Here the Commission considered each of three factors identified in Arrow as relevant: (1) the degree of "circuity" involved in the questioned route when compared with the local route normally employed by intrastate carriers; (2) the economic or operational justification for such routing; and (3) the proportion of the carrier's overall operation accounted for by the questioned traffic. *Arrow*, 113 M.C.C. at 220.

There is substantial evidence to support the ICC's conclusion that Hover's operation passes muster under Arrow. "No single factor is controlling," *id.*, but it is logical that the importance of the circuity factor should vary in inverse proportion to the strength of the economic or operational justification for the routing.

Spoke-and-hub traffic patterns often improve efficiency by decreasing unused capacity. Overnight couriers and airlines provide the best-known examples, but the ICC has long recognized that the use of such patterns may promote the efficient movement of less-than-truckload-lot shipments of freight. *See Rock Island*, 99 M.C.C. at 306; *Missouri Public Service Com'n v. Missouri-Arkansas Transp. Co.*, 103 M.C.C. 641, 647 (1967); *Maudlin v. Southwest Delivery Co.*, No. MC-C-10930, 1985 Fed. Carr. Cas. (CCH) ¶ 37,198 (Nov. 15, 1985), *aff'd without op.*, 835 F.2d 1435 (9th Cir. 1987).

Of course, "the mere assertion that operating efficiencies flow from a circuitous operation is not enough." *Rock Island*, 99 M.C.C. at 307. The ICC looked closely at the economic and operational advantages of Hover's spoke-and-hub system, and found that the nightly volume of intrastate shipments between any two of Hover's Michigan terminals would be only 1,000 to 7,500 pounds. This would not be enough to support nightly

direct runs. The average trailer load into or out of South Bend, in contrast, was 22,000 pounds. Hover's spoke-and-hub traffic patterns enabled the company to use its trucks more efficiently, and as the ICC noted, they allowed Hover to provide overnight service between points in Michigan that would not otherwise receive it. *See Service Storage*, 359 U.S. at 176 ("the creation of this flow of traffic [less-than-truckload-lot shipments to and from a hub] is a timesaver to the shipper since there is less time lost waiting for the making up of a full truck load"). Although Hover might have been able to route a few of these Michigan-to-Michigan shipments directly (as it had in 1986 until caught by the PSC), we have no basis for rejecting the Commission's conclusion that the spoke-and-hub system was more efficient overall.

The petitioners also argue that, the Arrow test aside, the ICC erred in failing to consider the direct evidence of bad faith. Many of the cases relied on by the ICC did not involve such direct evidence. *See Service Storage*, 359 U.S. at 175; *Rock Island*, 99 M.C.C. at 312; *Jones Motor Company v. United States*, 218 F.Supp. 133, 137 (E.D. Penn. 1963), *petition for reconsideration denied*, 223 F.Supp. 835 (E.D. Penn. 1963), *aff'd sub nom. Highway Express Lines, Inc. v. Jones Motor Co., Inc.*, 377 U.S. 217 (1964) (per curiam); *Missouri Public Service Commission*, 103 M.C.C. at 648.

We are given pause by the ICC's assertion in this court that "motivation is not relevant here because the criteria set forth in Arrow, supra, have been met." As the ICC has noted elsewhere, direct evidence of bad faith is certainly relevant. See *Rock Island*, 99 M.C.C. at 307 (efficiency "is not the sole test of good faith" but is an "indicator of the carrier's intent"). And "where the matter of comparative efficiency presents a reasonably close question, the issue of lawfulness should not be determined on that basis alone." *Rock Island*, 99 M.C.C. at 316 (citing *Service Storage*, 359 U.S. at 176); *Thurston Motor Lines, Inc.*, 104 M.C.C. 1,15 (1967).

The ICC's decision makes it clear that the Commission did consider the relevant evidence. Its discussion of the "direct evidence" that was offered to show subterfuge or bad faith probably leaves something to be desired, but it was within the Commission's province to find, as it did, that the fact that Hover had admittedly engaged in illegalities was not dispositive. It was likewise within the Commission's province to find, as it did, that the statement Hover's Mr. Van Bokkem gave a newspaper reporter about the regulatory consequences of Hover's move to South Bend would not support the conclusion that the move was made solely to bring those consequences about. Where the move is adequately justified on economic grounds, we cannot say the ICC was required to find bad faith because Hover recognized the regulatory consequences as well. Nor can we say the Commission was wrong in giving the apparent efficiency of Hover's operations more weight than the direct evidence of bad faith. Substantial evidence supports the Commission's conclusion, regardless of the accuracy of its subsequent dictum on the irrelevance of motivation.

The petitions for review are **DENIED.**

WELLFORD, Circuit Judge, **concurring in part and dissenting in part.**

I concur in the majority's conclusion concerning jurisdiction (Part II) but would augment the discussion by adding the following:

In *Rock Island Motor Transit Co. v. Watson Wilson Transportation*, 99 M.C.C. 303, 306 (1965), *aff'd*, 256. F. Supp. 812 (S.D. Iowa),[1] the Commission stated:

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[1] It is interesting to note that Justice Blackmun, then a Circuit Judge, was one of the three judges on this panel.

> Since the Supreme Court's decision in *Service Storage and Transfer Co. v. Virginia*, 359 U.S. 171 (1959), it has been settled that the Commission's competence to interpret its own certificates extends to matters such as those involved here wherein it is alleged that Watson's interstate rights are being used as a subterfuge to evade lawful state regulation through the device of routing normally intrastate traffic across the Iowa State line and back.

The Court in *Service Storage* quoted from *Castle v. Hayes Freight Lines*, 348 U.S. 61, 63-64 (1954) as follows:

> "Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce." We pointed out that 49 U.S.C. § 312 provides "that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided'. . . . Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate."

359 U.S. at 176. The Court continued, concluding that:

> It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action. The Commission has long taken this position.

359 U.S. at 177.

The petitioners have the burden of proof in this case, as the Commission held, to show that "the considered traffic is intrastate in character" rather than interstate commerce. *Missouri Public Service Commission v. Missouri Arkansas Transportation*

Co., 103 MCC 641, 649 (1967). The petitioners failed to carry this burden.

On the question of circuity, I agree with the majority that petitioners have failed to carry their burden of proof. The Michigan Public Service Commission asserts that its data indicated a degree of circuity of 92% with respect to Hover's Michigan operations which are at issue. Petitioners claim that the ICC improperly and erroneously relied instead on a 24% circuity factor. The ICC explained its calculation in footnote 3 to its opinion:

> This figure takes into account all traffic moving to and from defendant's Michigan terminals (including traffic with origins or destinations outside Michigan). The higher circuity factor proposed by complainant only includes Michigan-to-Michigan traffic. Because all traffic moves in the same vehicles to and from South Bend, it is inappropriate to exclude arbitrarily the traffic moving ultimately to or from points outside Michigan. If defendant [Hover] has a trailer moving to or from South Bend containing traffic destined to points beyond Michigan, the degree of circuity involved in that trip cannot be analyzed properly by excluding that traffic.

J/A at 12 n.3.

Petitioners complain that this is a "new approach to determining circuity" or a "total departure" and is "wrong." MPSC Brief at 18; Allied Brief at 9. Allied also complains about the ICC's statement that "[c]ircuity ... does not play a major role in evaluating whether a LTL carrier's operation across a State line is reasonable and logical." J/A at 11. Allied argues also that the proof shows that "Michigan to Michigan service conducted by Hover . . . comprised 59% of Hover's overall number of shipments" during a study period, and that 75% of Hover's revenues were "derived from shipments with an origin or destina-

tion or both *within the State of Michigan.*" Allied Brief at 9-10 (emphasis is original).

ICC has the responsibility to make the factual determinations concerning circuity. *Eichholz v. Public Service Commission*, 306 U.S. 268, 274 (1939). It has the duty then to consider all the evidence submitted on this question, to analyze it, and to make a decision about the degree of circuity involved, and which factors and data bear most heavily upon that determination. I am in agreement that we should not disturb the ICC findings on degree of circuity even if we entertain some doubt about the logic of its approach and even if the method utilized in this case is a new and total departure from its prior approach to calculation the degree of circuity, unless this calculation and approach may be shown to be arbitrary and capricious with respect to review of ICC orders.

I have concern, however, with respect to the conclusion reached by the ICC that the circuity factor "does not play a major role" in the evaluation process of whether or not subterfuge is present. The Supreme Court affirmed a three-judge court decision, *Jones Motor Co. v. United States*, 218 F. Supp. 133 (E.D. Pa. 1963), *sub nom*, in *Highway Express Lines, Inc. v. Jones Motor Co.*, 377 U.S. 217 (1964) (per curiam), setting aside an ICC determination of subterfuge based solely on circuity. Jones, however, does not translate into a conclusion that circuity is not a major or principal factor, though not the sole or predominant one, in deciding whether or not a motor carrier has engaged in subterfuge. It was described as a "significant factor" in *Pennsylvania Public Utilities Commission v. Arrow Carrier Corp.*, 113 MCC 213 (1971), *aff'd* 1973 Fed. Carr. Cas. 419 (M.D. Pa. 1973) (three judge court), *aff'd mem.*, 415 U.S. 902 (1974). I agree with this description and would hold that, in a case of this nature, the factor of circuity is substantial and must be given full consideration, together with the other factors herein discussed, in determining the question of bad faith or subterfuge.

I would, then, remand this matter to the ICC for reconsideration of the question of circuity as having a *significant role*, rather than denigrating it as "not a major" one. I would expect also that upon remand ICC would explain its rationale for its new approach in calculating the degree of circuity in order to demonstrate that is methodology on circuity is not arbitrary and capricious but rather rational.

I am in agreement also with the majority's discussion of economic or operational justification for the ICC's decision under review. It is important to remember that Hover is an LTL carrier, one which handles many "less than truckload shipments in Michigan and in other states." It described its method of operation and the Commission essentially found it to be functionally efficient and logical.

> Hover currently operates a break-bulk operation. Its main hub facility is located in South Bend, Indiana. Hover operates by collecting freight from the originating points by peddle runs. Such freight is first consolidated at Hover's satellite terminals and then line-hauled to the central South Bend terminal. After being sorted, individual packages are line-hauled back out to the satellite terminals closest to their ultimate destinations, where they are then delivered via peddle runs.

Thus, the Commision correctly found that Hover's method of operation was justified.

My disagreement with the majority relates to the question of bad faith in this case. The latest statement of the tests for bad faith may be seen in *Corporation Commision of Oklahoma v. Film Transit, inc.*, MC-C-10802 (3/10/82):

> The tests to determine whether transportation between two points in the same State performed through a point in another State is truly interstate in nature or a subterfuge to

> avoid State regulation are set forth in *Pennsylvania P.U.C. v. Arrow Carr. Corp.*, 113 M.C.C. 213, 219 (1971), affirmed *Pennsylvania P.U.C. v. United States*, 1973 F. Carr. Cas. 82, 419 (M.D. Pa. 1973), (*Pennsylvania*). The Commision and the Courts have looked to the "reasonableness" of a carrier's *modus operandi*, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the local route normally employed by the intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority and desire to transport otherwise unavailable traffic, and (3) the incidental or dominant character of the intrastate traffic as a portion of the carrier's operation.

Slip Op. at 2.

Most of the cases cited by the parties do not involve concrete evidence of bad faith actions which indicate directly, rather than through inference, that a carrier has sought to evade a particular state regulatory control. Analysis of the tests, then, is the means used by the Commission and the courts to determine whether there is subterfuge. In this case, ICC took note that "Hover acknowledges the *unlawful operations* it permitted in 1986 . . ." J/A at 10. In its brief, MPSC argues, moreover, that "Hover continued to provide false documentation and affidavits containing falsified information to make the direct Michigan to Michigan shipments appear as though they had been routed through South Bend, Indiana." MPSC Brief at 26. ICC makes no mention of these charges, simply observing that Hover instituted procedures "to ensure that such movements never occur again." J/A at 10. Mr. Van Bokkem testified also regarding an incident bearing on this position:

> Q. Mr. Van Bokkem, do you ever recall telling a newspaper reporter that by moving your facilities from Niles to South Bend that you could in fact serve the State of Michi-

gan without holding authority from the Michigan Public Service Commission?

A. I said something to that effect, yes.

Q. And would you have said that in about 1983?

A. That would have been 1983, yes.

Q. Who was the reporter that you spoke to at that time?

A. I don't know. It was some local paper.

J/A at 67-68.

This testimony might be taken as some evidence of an intent to subvert or evade regulation by Michigan authorities, which is material to an inquiry about subterfuge. ICC, however, in its opinion, makes this observation concerning this Van Bokkem statement, which petitioners claim is part of the evidence "that Hover's sole purpose in moving ... was to avoid MPSC regulation." J/A at 13.

> In any event, *motivation is not relevant* here because the criteria set forth in *Arrow, supra*, have been met.

Id. (emphasis added).

I am at a loss to understand this part of the ICC's conclusions in this controversy. Evidence of bad faith is, indeed, highly relevant to any ultimate determination of subterfuge to circumvent legitimate state regulation. I am aware that in another part of the ICC opinion at issue the Commission finds that the Van Bokkem statement "does not form any basis ... to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation." *Id.* Absent the conclusion that "motivation is not relevant," perhaps ICC has chosen a rational explanation for Van Bokkem's admission. I am persuaded, however, that there should be a remand to the ICC for a clear explanation of its rationale concerning the al-

leged "bad faith" actions of Hover which, are the focus of much of petitioners arguments, recognizing that "no single factor" is controlling.

I would **DISSENT**, therefore, to the extent that I believe a **REMAND** is required for further clarification and explanation by ICC on the circuity and direct evidence of "bad faith" questions in this case.

NO. *89-3383/3401/3414*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLIED DELIVERY SYSTEM, INC. (89-3383), ALVAN MOTOR FREIGHT, INC; TNT HOLLAND MOTOR EXPRESS, INC.; AND PARKER MOTOR FREIGHT, INC., (89-3401), and STATE OF MICHIGAN; and MICHIGAN PUBLIC SERVICE COMMISSION (89-3414),	
Petitioners-Appellants,	
v.	
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,	
Respondents,	
HOVER TRUCKING COMPANY OF MICHIGAN,	
Respondent-Intervenor.	

Filed *September 10, 1990*

BEFORE: WELLFORD and NELSON, Circuit Judges; and EDWARDS, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original

panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30092

MICHIGAN PUBLIC SERVICE COMMISSION
v.
HOVER TRUCKING COMPANY OF MICHIGAN

Decided: March 3, 1989

By complaint filed under 49 U.S.C. 11701 on March 21, 1988, as amended, Michigan Public Service Commission (MPSC or complainant) seeks a finding that operations by Hover Trucking Company of Michigan (Hover or defendant) from origins in Michigan to destinations in Michigan moving through Hover's South Bend, IN break-bulk and consolidation facility are not lawfully conducted pursuant to its interstate au-

thority, but are instead shipments moving in intrastate commerce. Complainant seeks various additional relief if we determine that these operations are in intrastate commerce. By decision served May 17, 1988, the proceeding was set for handling under the modified procedure and Regular Common Carrier Conference (RCCC) and Allied Delivery System, Inc. (Allied), individually, and Alvan Motor Freight, Inc., Central Transport, Inc., TNT Holland Motor Express, Inc., and Parker Motor Freight, Inc. (Alvan), jointly, were permitted to intervene in support of MPSC. Complainant and intervenors Allied, RCCC, and Alvan have filed opening statements, Hover has replied, and the former have filed rebuttal materials.

PRELIMINARY MATTERS

Intervenor Allied moves to strike Appendix C to defendant's statement and the references to it in the statement. This material describes the nature of Allied's handling of less-than-truckload (LTL) traffic through break-bulk terminals. Hover replied to the motion. Allied correctly points out that its handling of this traffic is not relevant to the lawfulness of defendant's operations. Accordingly, the motion will be granted and the material stricken from the record.

Complainant and intervenors Alvan and RCCC move to strike portions of the statement by Hover witness Tony Van Bokkem describing an opinion by a Commission field auditor concerning the lawfulness of Hover's operations. Hover replied to the motion. This motion goes more to the weight to be afforded the evidence than to its admissibility. Therefore, the motion will be denied.

Finally, Hover moves to strike: (1) a portion of the statement of Catherine Fisher, submitted as Appendix B to complainant's rebuttal, in which she testifies as to facts based on statements made to her by a former driver for a Hover agent; (2) a portion of complainant's rebuttal brief containing evidence derived

from a computer study that it claims does not support the testimony given; and (3) assertions in the rebuttal arguments of complainant and intervenor Alvan concerning average daily traffic volumes between individual Hover terminals in Michigan that it contends are not derived from the evidence of record. Complainant and intervenor Alvan replied to the motions. Embraced within complainant's and Alvan's replies are motions to strike Hover's motions. Hover replied to each motion. Hover's three motions to strike will be denied as, once again, they go more to the weight to be afforded the evidence than to its admissibility. In view of our action, the motions to strike Hover's motions are moot.

BACKGROUND

Hover holds nationwide authority to transport general commodities in Certificate No. MC-101619. Prior to 1979, Hover conducted operations as a local interline carrier in southwest Michigan and northern Indiana. Hover's operations were performed through a single terminal located in Niles, MI, and Hover served primarily as a connecting line for longer haul carriers.

In 1979, Tony Van Bokkem and two other individuals assumed control of Hover. During these initial years, large portions of Hover's traffic continued to consist of interline freight moving in interstate commerce. Hover picked up or delivered freight in southwest Michigan and northern Indiana using its terminal at Niles, and it interlined freight with other carriers at South Bend. Hover then expanded its own single-line operations. By late 1982, Hover states that it outgrew its existing terminal at Niles, which had 20 doors and 3,000 square feet of platform space. In June 1983, Hover moved to a facility in South Bend with 37 doors and over 12,000 square feet of dock space. In June 1985, Hover moved to its present South Bend facility. It is even larger, with 48 doors and over 20,000 square feet of platform space.

During this period of expansion, Hover established a network of agency terminals that provided local pickup and delivery services for its freight within their respective territories. Hover has three such terminals in Wisconsin, one in Kentucky, six in Illinois, four in Indiana, three in Ohio, and seven in Michigan.

With this expansion, Hover continued its service pattern of moving traffic through its headquarters' break-bulk and consolidation facility at South Bend. Shipments picked up by Hover (through the operations of agents) were brought to the agents' facilities, loaded onto trailers moving to South Bend, sorted at South Bend onto trailers moving to the appropriate destination agency terminals, and ultimately delivered by the destination agents. This method of service assertedly allowed Hover to avoid inefficient movements of small amounts of freight between individual terminals by combining all over-the-road movements into one or more trailers moving to South Bend, thus enabling Hover to offer overnight service within its area of operation.

Complainant contends that, by transporting freight between Michigan points through its South Bend facility, Hover provides extremely circuitous transportation services. Complainant contends that this is not a *bona fide* interstate operation and is conducted in bad faith as a subterfuge to escape Michigan jurisdiction. It argues that Hover's service between Michigan points is unlawful, unreasonable, and an abuse of its ICC certificate.

MPSC submitted a March 1988 study of Hover's operations conducted by Rodney F. Krietemeyer of the Michigan State Police. According to this study, moving shipments with a Michigan origin and destination through South Bend resulted in a

circuity factor of 92 percent.[1] Complainant asserts that this traffic is the dominant part of Hover's overall operations, that there is no economic or operational jurisdiction in routing the traffic through South Bend, and that it results in costs exceeding revenues.

Complainant contends that Hover's sole purpose in relocating its terminal headquarters from Niles to South Bend was to enable it to offer substantial discounts on freight moving from Michigan origins to Michigan destinations pursuant to its interstate tariff. Hover's interstate rates are assertedly up to 40 percent lower than Michigan intrastate rates. Complainant further notes that, in a complaint proceeding before MPSC, Hover admitted that it had transported some shipments from Michigan origins to Michigan destinations without first moving the shipments through South Bend (or otherwise across State lines), and without the requisite MPSC operating authority.

In a statement appended to complainant's brief, Catherine Fisher, an officer with the Michigan Department of State Police Motor Carrier Division, states that she interviewed a driver for Hover's agency terminal in Manton, MI who stated that direct runs of full trailerloads of freight moved from Manton to Flint, MI without first moving through Hover's South Bend facility. MPSC also includes a study by Glenn L. Fast, a transportation consultant, of 14 Michigan to Michigan shipments moving through South Bend that assertedly were noncompensatory because of the circuity. Finally, Sittichai Anprasert, an economic analyst with MPSC, indicates on behalf of MPSC that, during 1988, "Michigan intrastate truck shipments" were responsible for 14.72 percent of Hover's systemwide operating revenues.

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[1] This means that the mileage involved in a movement through South Bend is, on the average, 92 percent greater than the mileage involved in a direct movement between the involved points.

Intervenor Allied expresses its concern over business lost to interstate carriers, such as Hover, whose routing traffic out-of-State enables them to charge lower, interstate rates. RCCC believes that Hover's admission of past unlawful operations demonstrates that its operations through the South Bend terminal are inefficient. Alvan also focuses on Hover's past unlawful operations, which, it argues, warrant a finding that the routing of traffic through South Bend is merely a subterfuge to avoid MPSC regulation.

In reply, Hover notes that its operating system has evolved into a system similar to the break-bulk systems of other carriers with which Mr. Van Bokkem was familiar. Hover is able to maintain close control over all its shipments because the freight is handled through one terminal facility. All vehicles are based at that facility, and all freight pickups are returned to that facility for transfer onto delivery vehicles for the next day's operation. When it began to establish agency stations, the pattern of moving all freight through the South Bend terminal continued. Agents do not become involved in the preparation of paperwork, dispatch, and other shipment responsibilities which, assertedly, are best performed by headquarters' personnel. The agent's sole function is to pick up freight and load it unsorted onto line-haul trailers moving to Hover's main terminal.

Hover notes that its use of a break-bulk and consolidation terminal as a gathering point for freight moving throughout its system ensures that it will be able to load that freight onto units outbound from South Bend and reach all of its destination terminals by the following morning. Hover thus avoids holding freight at an origin terminal because of lack of sufficient volume on a particular evening to move it to a particular destination terminal. It also avoids the problem of low freight density between its individual terminals. Hover finds it more efficient and economical to load line-haul vehicles to maximum capacity and make full-volume round trip runs to and from South Bend

than to have these vehicles fan out between individual terminals at less than full capacity.

Hover further notes that the design of its system is similar to that of many other carriers, particularly those concentrating on the movement of packaged or LTL freight. In LTL operations, the critical factor is said to be not the number of miles a particular shipment travels, but the carrier's overall cost of transporting all of its shipments.

Hover states that it lacks sufficient freight volume between terminals to support a nightly trailer dispatch service at each. The largest average volume between any of these terminal combinations is slightly in excess of 7,500 pounds nightly in each direction, while volumes for other combinations are as little as 1,000 pounds nightly, in each direction. Hover avers that it would be impossible to sustain a system of direct runs between these individual terminals given such volumes. By contrast, aggregating all freight moving to and from the Michigan terminals into combined loads to or from South Bend results in an average trailer load factor of 22,000 pounds. The average two-way flow of traffic between the Michigan terminals and the South Bend consolidation facility ranges between 30,000 and 80,000 pounds per terminal. When these economies are extended across the breadth of Hover's system, use of its South Bend facility is said to reduce both the total vehicle miles traveled and the number of vehicles operated.

Responding to MPSC's circuity calculations, Hover notes that the study focuses only on the traffic moving to and from its Michigan terminals that has both an origin and destination in Michigan, but that it ignores the large volume of shipments moving to and from points outside Michigan through South Bend. According to Hover, a more realistic analysis of circuity focuses on the total traffic moving to or from these terminals. By thus considering the total number of shipments moving between terminals, the circuity factor is reduced from 92 to 24 percent.

In response to MPSC's allegations that the Michigan-to-Michigan traffic constitutes a significant portion of its systemwide traffic, Hover calculates, based upon MPSC's March 1988 traffic study, that only 9.94 percent are shipments which, but for the move through its South Bend facility, would otherwise be intrastate.

Hover acknowledges the unlawful operations it performed in 1986 and details the procedures that it instituted to ensure that such movements never occur again. It also submits a verified statement from its agent at the Manton terminal that indicates that the direct runs between Manton and Flint alleged by MPSC were not made by Hover, but by a Canadian carrier.

In rebuttal, complainant concedes that it neglected to exclude certain interline shipments from the intrastate portion of its traffic study, thereby inflating the overall percentage of shipments by Hover that complainant claimed to be intrastate in its opening statement (although it also claims a minor discrepancy in defendant's methodology). Allied and Alvan attack the efficiency of Hover's South Bend terminal operations and propose other methods of handling this traffic on a purely intrastate basis. Finally, RCCC argues that Mr. Van Bokkem is not a credible witness because of a discrepancy between an affidavit he submitted in the underlying MPSC proceeding and a stipulation and agreement he signed in that proceeding concerning the routing of shipments transported during 1986. This discrepancy is said to impeach Mr. Van Bokkem's credibility.

DISCUSSION AND CONCLUSIONS

It is well settled that the burden of proof in a complaint proceeding alleging unlawful operations is on the complainant. *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. 303 (1965); *Missouri Pub. Ser. Comm.* v. *Missouri Arkansas Transp. Co.*, 103 M.C.C. 641 (1967). Moreover, it is long established that, subject to the exception discussed below, the

transportation of property by motor vehicle between points in the same State, through another State, is transportation in interstate commerce subject to the jurisdiction of this Commission, and that transportation crossing a State line is always in interstate commerce, regardless of how small a distance may be traversed in the other State. *See* 49 U.S.C. 10521(a)(1)(B); *Greyhound Lines* v. *Mealey*, 334 U.S. 653, 660-661 (1948).

The theory of the complaint in this case is based on the principle that a carrier may not use its interstate operating authority to evade legitimate State regulation of intrastate commerce. Transportation provided between points in the same State through another State is unlawful and beyond the scope of a carrier's interstate operating authority when it is conducted as a subterfuge to avoid State regulation or in bad faith. The leading case in this area is *Pennsylvania P.U.C.* v. *Arrow Carrier Corp.*, 113 M.C.C. 213 (1971) (*Arrow*).

In determining whether bad faith or subterfuge is involved, the Commission and courts generally look to the reasonableness of the carrier's manner of operations, as evidenced by: (1) the degree of circuity involved in the interstate route when compared with the routes of intrastate carriers; (2) the presence or absence of economic or operational jurisdiction for such routing apart from a carrier's potential lack of intrastate authority or, if relevant, desire to transport otherwise unavailable traffic; and (3) the relationship of the traffic which would otherwise be intrastate traffic to the carrier's overall operations. No single factor is controlling, nor is there any presumption in favor or against any one. *Arrow, supra*, at 220.

We previously have recognized that the first *Arrow* test, circuity, does not play a major role in evaluating whether a LTL carrier's operation across a State Line is reasonable and logical. In *Rock Island, supra*, we held that, where LTL traffic is concerned, circuity alone cannot determine the lawfulness of an operation, because a circuitous operation through a consolida-

tion terminal can be more logical and efficient than a more direct operation. In *Missouri, supra*, we similarly recognized that, as a matter of economic and practical necessity, LTL traffic generally must be handled through terminals for consolidation and break-bulk, notwithstanding that this often results in circuitous routing.[2]

In any event, the degree of circuity in Hover's operations is well within the degree of circuity previously found to be acceptable. We find that the appropriate circuity factor is 24.2 percent.[3] This amount is well within the 74.9 percent circuity factor found to be acceptable in *Jones Motor Co.* v. *United States*, 218 F. Supp. 133 (E.D. Pa. 1963), *aff'd on rehearing*, 223 F. Supp. 835 (E.D. Pa. 1963), *aff'd per curiam sub nom., Highway Express Lines* v. *Jones*, 377 U.S. 217 (1964), *rehearing denied sub nom., Pennsylvania Pub. Util. Comm.* v. *Jones Motor Co., Inc.*, 377 U.S. 984 (1964). Accordingly, we conclude that the circuity of operation experienced by Hover in moving shipments to and from its South Bend break-bulk facility is an ordinary and routine facet of the business of transporting less-than-truckload shipments of general commodities through such a facility.

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[2]

Developments since 1980 in both trucking and air freight and passenger service indicate the increasing use of "hub" operations such as Hover's to increase traffic density and lower overall cost.

[3]

This figure takes into account all traffic moving to and from defendant's Michigan terminals (including traffic with origins or destinations outside Michigan). The higher circuity factor proposed by complainant only includes Michigan-to-Michigan traffic. Because all traffic moves in the same vehicles to and from South Bend, it is inappropriate to exclude arbitrarily the traffic moving ultimately to or from points outside Michigan. If defendant has a trailer moving to or from South Bend containing traffic destined to points beyond Michigan, the degree of circuity involved in that trip cannot be analyzed properly by excluding that traffic.

As to the operational jurisdiction for Hover's use of its headquarters' consolidation terminal at South Bend, we have recognized repeatedly that operating through a consolidation terminal is a reasonable manner of transporting LTL, general-commodity traffic, even when it involves moving single-State traffic through a terminal in another State. In *Rock Island, supra* at 306 and 311, it was recognized that circuity alone cannot determine the lawfulness of an operation, because operations through a consolidation terminal are natural and logical, and more efficient than direct operations with respect to such traffic. In *Missouri, supra* at 674, it also was acknowledged that, as a matter of economic and practical necessity, LTL traffic generally must be handled through terminals for assembly, consolidation, and distribution, notwithstanding that this often results in circuitous routings. In *Pennsylvania Public Utility Comm.* v. *Leonard Exp.*, 107 M.C.C. 451, 456 (1968), it was stated that a logical and normal operation through the carrier's headquarters or base of operations is a prime justification for an interstate routing, and counterindicatory of subterfuge to avoid State regulation.

We also note that the finding of subterfuge in *Haley, P.U.C. of Oreg.* v. *City Transfer*, 112 M.C.C. 80 (1970), rested, in large measure, on the fact that the interstate operation was not through the carrier's headquarters or base of operations in the other State, but rather commenced or terminated at its headquarters in the same State in which the challenged traffic was picked up and delivered. Here, we note that the South Bend location for defendant's facility is a logical choice considering the fact that Hover's operations encompass the six-State area of Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan. Geographically, South Bend is centrally located in this area.

Complainant avers that Hover's sole purpose in moving its headquarters to South Bend was to avoid MPSC regulation. It bases this conclusion upon a statement by Mr. Van Bokkem to a newspaper reporter at the time of the move in which he ac-

knowledged that, in moving to South Bend, Hover could serve Michigan without holding MPSC authority. This does not form any basis for us to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation. In any event, motivation is not relevant here because the criteria set forth in *Arrow, supra*, have been met.

We find the assembly of Hover's Michigan freight into combined inter-terminal loadings to and from South Bend a logical solution for a carrier that has relatively light volumes of freight moving between most of its individual terminals. The evidence shows that Hover lacks sufficient freight volume between its Michigan terminals to establish a system of regular direct runs between those terminals. Of the various combinations of Michigan terminals, the largest average two-way volume is some 7,500 pounds nightly in each direction. Volumes for other traffic lanes between Michigan terminals are as low as 1,000 pounds nightly in each direction. Direct, over-the-road movements between individual terminals generally would not be economically feasible with such small volumes of freight.

By contrast, when Hover consolidates trailerloads for movements to or from South Bend, its average trailer load factor is approximately 22,000 pounds. This system gives Hover the advantage of scale economies generated *both* by the aggregation of traffic moving between Michigan terminals and with the much larger volume of traffic moving between these terminals and points outside of Michigan. Additionally, it allows Hover to provide overnight service on much traffic that otherwise would not receive it.

Consequently, we conclude that Hover's use of its South Bend facility is a reasonable, logical, and normal way of handling LTL traffic.

Finally, concerning the incidental or dominant nature of the

single-State traffic involved, we are presented with various figures from the parties describing the single-State traffic as a percentage of systemwide revenues, as a percentage of systemwide shipments, and as a percentage of total weight. The percentage of systemwide shipments which would otherwise be unauthorized if moved direct rather than through its South Bend facility most accurately reflects the relative amount of single-State, in relation to system-wide transportation. This calculation takes into account adjustments for single-State shipments interlined with other carriers at points outside of Michigan and shipments between points in Michigan that Hover is authorized to serve under its MPSC authority. The single-State shipments constitute 9.94 percent of system-wide shipments. This figure is well within the calculation in *Jones, supra*, where 16.9 percent of systemwide shipments was found to constitute an incidental amount.

In summary, we find that complainant has failed to establish that defendant routes traffic moving between points in Michigan through South Bend as a subterfuge to transform intrastate traffic into interstate traffic so as to avoid Michigan's regulatory jurisdiction.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Allied's motion to strike Appendix C to defendant's verified statement and all references to it in that statement is granted and the material stricken from the record.

2. The remaining motions to strike filed by complainant, defendant, and intervenors are denied.

3. This proceeding is discontinued.

4. This decision is effective on its date of service.

By the Commission, Chairman Gradison, Vice-Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

Noreta R. McGee
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30092

MICHIGAN PUBLIC SERVICE COMMISSION

v.

HOVER TRUCKING CO., INC.

Decided: May 12, 1988

The Michigan Public Service Commission has filed a complaint with the Commission. The complaint has been served on defendant, and defendant has replied.[1] Alvan Motor Freight,

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[1] The complaint is against Hover Trucking Co., Inc., and this proceeding has been docketed as such. However, defendant's reply indicates that Hover Trucking Company of Michigan (formerly named Hover Trucking Co.) is the proper party. In addition, Hover Trucking Company of Michigan is affiliated with a company named Hover Trucking Company, an Indiana Corporation. If complainant agrees that Hover Trucking Company of Michigan is the proper defendant, it should so amend its complaint.

Inc., Central Transport, Inc., TNT Holland Motor Express, Inc., and Parker Motor Freight, Inc., jointly, and the Regular Common Carrier Conference and Allied Delivery System, Inc., individually have filed petitions to intervene pursuant to 49 CFR 1112.4. Petitioners seek relief identical to that sought by complainant. Defendant does not oppose their intervention. Accordingly, there is good cause to allow petitioners to intervene. Intervenors are cautioned that the issues in this proceeding may not be broadened beyond those in the complaint.

Complainant and petitioners request an oral hearing. The requests will be denied. It is not likely that disposition of the issue in this proceeding will depend upon dipsuted evidence. Therefore, an oral hearing is not warranted.

This proceeding shall be handled on the basis of written verified statements. A procedural schedule will be established sufficient for the parties to use the Commission's discovery rules (49 CFR 1114, Subpart B).

It is ordered:

1. The petitions to intervene are granted.

2. The requests for oral hearing are denied.

3. Complainant's and petitioners' statements must be filed by July 15, 1988.

4. Defendant's reply must be filed by August 15, 1988.

5. Complainant's and petitioners' rebuttal must be filed by September 6, 1988.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee
Secretary

(SEAL)

STATUTORY PROVISIONS

INTERSTATE COMMERCE ACT

49 U.S.C. § 10101. Transportation Policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and —

(1) in regulating those modes —

(A) to regulate and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

* * *

(3) in regulating transportation by motor carrier of passengers (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objections of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiatives enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

INTERSTATE COMMERCE ACT

49 U.S.C. § 10521. General Jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier —

(1) between a place in —

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not —

(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier.

(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a state over a motor carrier.

ADMINISTRATIVE PROCEDURES ACT

5 U.S.C. § 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be deter-

mined on the record after opportunity for an agency hearing, except to the extent that there is involved —

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [an] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title. . . .

5 U.S.C. § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title. . . .

5 U.S.C. § 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title. . . .

JUDICIAL REVIEW

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those partes of it cited by a party, and due account shall be taken of the rule of prejudicial error.

MICHIGAN MOTOR CARRIER ACT

Public Act 254, 1933, M.C.L. 475.1 *et seq.*; M.S.A. 22.531 *et seq.*

An Act to promote safety upon and conserve the use of public highways of the state; to provide for the supervision, regulation, and control of the use of such highways by all motor vehicles operated by carriers of property for hire upon or over such highways; to preserve, foster, and regulate transportation and permit the coordination of motor vehicle transportation facilities; to provide for the supervision, regulation, and control of the use of such highways by all motor vehicles for hire for such purposes; to classify and regulate carriers of property by motor vehicles for hire upon such public highways for such purposes; to give the Michigan Public Service Commission jurisdiction and authority to prevent evasion of this act through any device or arrangement; to insure adequate transportation service; to give the commission jurisdiction and authority to fix, alter, regulate, and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the commission of rates, fares, and charges of contract carriers and to authorize the commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; to prescribe the powers and duties of said commission with reference thereto; to provide for appeals from the orders of such commission; to confer jurisdiction upon the circuit court for the county of Ingham for such appeals; to provide for the levy and collection of certain privilege fees and taxes for such carriers for such purposes and the disposition of such fees and taxes; and to provide for the enforcement of this act; and to prescribe penalties for its violations.

M.C.L. 475.1a; M.S.A. 22.531(1) Short title of act. Section 1a. This act shall be known and may be cited as "The motor carrier act."

M.C.L. 475.2; M.S.A. 22.532. Motor vehicles operated for hire; general purposes of regulatory act. Section 2. It is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the commission the power and authority to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) Relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; and (l) prevent evasion of this act through any device or arrangement.

Supreme Court, U.S.
FILED
JAN 8 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2) (2)

Nos. 90-926, 90-966

In The

Supreme Court of the United States

October Term, 1990

STATE OF MICHIGAN;
and MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners in No. 90-926,

and

ALLIED DELIVERY SYSTEM, INC.;
ALVAN MOTOR FREIGHT, INC.;
and PARKER MOTOR FREIGHT, INC.,

Petitioners in No. 90-966,

vs.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA; and
HOVER TRUCKING COMPANY OF MICHIGAN,

Respondents.

BRIEF OF RESPONDENT HOVER TRUCKING COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Dated: January 7, 1991

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER THE INTERSTATE COMMERCE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY, OR IN EXCESS OF STATUTORY AUTHORITY IN FINDING THAT HOVER TRUCKING COMPANY OF MICHIGAN'S METHOD OF CONDUCTING ITS INTERSTATE TRUCKING OPERATION IS "REASONABLE, LOGICAL, AND NORMAL."

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Nos. 90-926, 90-966

In The

Supreme Court of the United States

October Term, 1990

STATE OF MICHIGAN;
and MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners in No. 90-926,

and

ALLIED DELIVERY SYSTEM, INC.;
ALVAN MOTOR FREIGHT, INC.;
and PARKER MOTOR FREIGHT, INC.,

Petitioners in No. 90-966,

vs.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA; and
HOVER TRUCKING COMPANY OF MICHIGAN,

Respondents.

BRIEF OF RESPONDENT HOVER TRUCKING COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Respondent Hover Trucking Company ("Hover")[1] accepts the procedural history of this case submitted by

[1] Hover Trucking Company of Michigan, a Michigan corporation, the Defendant and Appellee in the proceedings below, was merged into Hover Trucking Commpany, an Indiana corporation, effective December 3, 1989. That merger does not affect the issues in this proceeding and the corporate entities will be referred to jointly as "Hover." Hover Trucking Company has no parent or subsidiary corporations.

Petitioners. For a factual summary of the case, Hover asks that the Court refer to the "Background" portion of the Interstate Commerce Commission decision below. (20a-25a)[2]

SUMMARY OF ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

Petitioners advance no convincing explanation as to why this Court should venture into the technical *minutiæ* of a case involving a statutorily based principle of law resolved conclusively by this Court in 1959. The sole issue in this case is whether the Interstate Commerce Commission ("ICC") properly exercised its jurisdiction under 49 USC § 10521(a)(1)(B) to regulate transportation "between a place in a State and another place in the same State through another State." Employing an analysis specifically approved by this Court in *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959), the ICC ruled that Hover's decision to perform service between points in Michigan through a "hub" terminal at South Bend, Indiana, along with service between five other midwestern states was "reasonable, logical, and normal." This is the very test approved and applied by this Court in *Service Storage*. Petitioners' unwarranted claims that the ICC used improper methods for calculating "circuity" in Hover's operation or assessing alleged evidence of "bad faith" fall far short of justifying reentry by this Court into an area of law which has been well settled for over thirty years.

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[2] All references to Appendix pages in this brief are to the Appendix to the petition of the State of Michigan, et al., in No. 90-926.

ARGUMENT

Notwithstanding Petitioners' claims of undue interference and impending destruction of restrictive state regulation of intrastate commerce, the fact remains that Congress has explicitely stated that transportation between points in a single state through another state is interstate commerce subject to the statutory authority of the ICC. 49 USC § 10521(a)(1)(B). Any concerns which might have existed as to the relative primacy of state and federal regulatory systems over shipments moving between points in a single state via routes through another state thus have been resolved conclusively by Congress. That resolution places the shipments at issue squarely within the jurisdiction of the ICC. The possibility that the ICC's regulation of market entry or rate levels may be less restrictive than comparable state regulation is irrelevant. Once a shipment between two points in a state crosses a state line, the unambiguous Congressional determination is that federal regulation by the ICC becomes applicable. *Greyhound Lines* v. *Mealey*, 334 U.S. 653, 660-61 (1948); *Gray Lines Tours* v. *ICC*, 824 F.2d 811 (9th Cir. 1987). The provisions of 49 USC § 10521(b) which preserve the residual powers of states to regulate intrastate transportation not regulated by the ICC do not limit the ICC's powers over the transportation of shipments which Congress has specifically directed the ICC to regulate.

While ICC case law has held that sufficiently strained or illogical routing of shipments between points in a single state through an adjoining state could be found to be a misuse of a carrier's ICC certificate, the ICC's decision that the facts of this case do not warrant such a finding cannot be considered arbitrary or capricious. One factor employed by the ICC to

evaluate alleged illogic in routing single-state shipments through an adjoining state is the mileage circuity of the interstate routings when compared to the short-line mileage. Hover argued that the proper test was to consider the mileage circuity of shipments moving between Michigan and *all* points on the Hover system via the South Bend "hub" terminal. The record indicated that Hover mixed its Michigan-to-Michigan shipments with shipments from Michigan to other states, and *vice versa* when moving shipments through South Bend. The method of analysis proposed by Hover allowed Hover to demonstrate that possible operating disadvantages of high circuity on Michigan-to-Michigan shipments could be outweighed by the benefits of low circuity on shipments between Michigan and other states. The ICC agreed with Hover's method of anaylsis. (27a)

Petitioners' argument that the ICC had not previously employed such an analysis ignores the fact that the ICC is free to make appropriate choices or alterations in its analytical methods as long as proper explanation is provided. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The ICC is not required to follow methodology employed in past cases when confronted with distinct fact situations such as those presented by Hover's "hub" method of conducting multi-state operations through a single terminal in South Bend.

There similarly was no error by the ICC in its consideration of alleged evidence of actual "bad faith" motivation of Hover in establishing its South Bend "hub" terminal. The evidence cited by Petitioners involves a statement by Hover's President to a news reporter in 1983 that opening of the South Bend facility would allow Hover to perform service between Mich-

igan points without holding authority from the Michigan Public Service Commission. (14a-15a) The ICC specifically analyzed this statement and concluded that it did not prove that Hover's purpose in establishing the South Bend terminal was to avoid regulation under Michigan law. (29a) The Sixth Circuit properly ruled that the ICC was entitled to interpret the evidence on this point and that such interpretation was not arbitrary or capricious. (9a)

Petitioners' final contention that the ICC was required to hold oral hearings in this matter is entirely without merit. The ICC considered the evidence in this case under its so-called "modified procedure" system described at 49 CFR 1112. This system satisfies all requirements of due process and procedural fairness required by the Constitution and the Administrative Procedure Act. 5 USC § 551, *et seq.*; *Trailways, Inc.* v. *ICC*, 681 F.2d 252 (5th Cir. 1982); *Crete Carrier Corp.* v. *U.S.*, 577 F.2d 49 (8th Cir. 1978). The ICC places extensive reliance on modified procedure to control what would otherwise be an unmanageable burden of oral hearings concerning cases subject to its jurisdiction. There is no basis for requiring any change in this long-approved procedural method.

CONCLUSION

The Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated:
1/7/91

Supreme Court, U.S.
FILED
FEB 8 1991
OFFICE OF THE CLERK

Nos. 90-926 and 90-966

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ALLIED DELIVERY SYSTEM, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld a ruling of the Interstate Commerce Commission that certain motor carrier transportation between two points in Michigan through Indiana is subject to federal, rather than state, regulation.

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No. 90-926

STATE OF MICHIGAN, ET AL., PETITIONERS

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is not reported. The decision of the Interstate Commerce Commission (Pet. App. 18a-31a) is not yet reported.

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[1] The petitions in Nos. 90-926 and 90-966 seek review of the same judgment on similar grounds. Our citations to "Pet. App." refer to the appendix to the petition in No. 90-926.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. A petition for rehearing was denied on September 10, 1990 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on December 10, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, the ICC exercises regulatory jurisdiction over transportation by motor carriers in *inter*state commerce. 49 U.S.C. 10521(a)(1). The statute reserves to the States authority to regulate wholly *intra*state motor transportation. 49 U.S.C. 10521(b)(1).

The interstate transportation within the ICC's jurisdiction includes transportation "between a place in * * * a State and another place in the same State through another State." 49 U.S.C. 10521(a)(1)(B). The courts and the ICC have recognized an implied exception to that element of the ICC's jurisdiction, however, for cases in which a carrier crosses state lines merely as a subterfuge to evade legitimate state regulation of intrastate commerce. See *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 179 (1959); *Eichholz* v. *Public Serv. Comm'n*, 306 U.S. 268, 274 (1939); *Pennsylvania PUC* v. *Arrow Carrier Corp.*, 113 M.C.C. 213 (1971) [hereinafter *Arrow*], aff'd *sub nom. Pennsylvania PUC* v. *United States*, 1973 Fed. Carr. Cas. (CCH) ¶ 82,419 (M.D. Pa. 1973), aff'd per curiam, 415 U.S. 902 (1974).[2]

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[2] Accord *Service Trucking Co.*, 94 M.C.C. 222, 225 (1963), aff'd *sub nom. Service Trucking Co.* v. *United States*, 239 F. Supp. 519, 521 (D.Md. 1965) (three-judge court), aff'd per curiam, 382 U.S. 43 (1965); *Pennsylvania PUC* v. *Hudson*

2. Respondent Hover Trucking Company of Michigan (Hover) is a motor carrier holding nationwide authority from the ICC to transport general commodities in interstate commerce. Pet. App. 20a. In March 1988, petitioner Michigan Public Service Commission (MPSC) filed a complaint with the ICC, under 49 U.S.C. 11701, alleging that Hover was routing shipments between points in Michigan through its South Bend, Indiana, break-bulk and consolidation facility in order to evade Michigan's regulation of motor carrier transportation within that State. Several other parties, including petitioners Allied Delivery System, Inc., Alvan Motor Freight, Inc., and Parker Motor Freight, Inc., intervened in support of the complaint. Pet. App. 18a.

The ICC heard the MPSC's complaint in accordance with its "modified procedures," 49 C.F.R. Pt. 1112, under which evidence is submitted in written form. Based upon the resulting record, the ICC concluded that the MPSC had "failed to establish that [Hover] routes traffic moving between points in Michigan through South Bend as a subterfuge to transform intrastate traffic into interstate traffic so as to avoid Michigan's regulatory jurisdiction." Pet. App. 31a.

a. At the outset, the ICC reviewed the history and basic pattern of Hover's operation. Prior to 1979, Hover operated primarily as a local interline carrier

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Transp. Co., 88 M.C.C. 745, 748 (1962), aff'd *sub nom. Hudson Transp. Co.* v. *United States*, 219 F. Supp. 43 (D.N.J. 1963) (three-judge court), aff'd per curiam *sub nom. Arrow Carrier Corp.* v. *United States*, 375 U.S. 452 (1964); *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. 303 (1965), aff'd *sub nom. Rock Island Motor Transit Co.* v. *United States*, 256 F. Supp. 812 (S.D. Iowa 1966) (three-judge court).

(a connecting line for longer haul carriers) in southwestern Michigan and northern Indiana; it conducted this business from a single terminal in Niles, Michigan. Pet. App. 20a. In 1979, under new ownership, Hover began to interline freight at South Bend, Indiana as well. *Ibid.* Hover also began to expand its own single-line operations (operations in which Hover would itself transport freight from the freight's origin to its destination). By late 1982, Hover had outgrown its Niles terminal, which had only 20 doors and 3,000 square feet of platform space. Consequently, in June 1983, it acquired a larger terminal in South Bend—with 37 doors and over 12,000 square feet of dock space—from another carrier. In June 1985, Hover moved into even larger quarters at South Bend—with 48 doors and over 20,000 of platform space—from which it currently operates. *Ibid.*

During its period of expansion, Hover established a network of agency terminals, from which agents provide local pickup and delivery services within their respective territories. Hover has three such terminals in Wisconsin, one in Kentucky, six in Illinois, four in Indiana, three in Ohio, and seven in Michigan. Pet. App. 21a. Even though its service area has expanded, Hover has continued its basic pattern of service. A shipment picked up by one of Hover's agents is first brought to that agent's terminal, where it is loaded onto a trailer moving to Hover's large break-bulk and consolidation facility at South Bend. At South Bend, shipments arriving from the agency terminals are sorted and loaded onto trailers which take them to the appropriate agency terminals for delivery to their destinations. *Ibid.*

b. Petitioners' basic contention is that the application of this system to freight moving between points

in Michigan is a subterfuge designed to avoid Michigan motor carriage regulation. Pet. App. 21a. In analyzing that claim, the ICC applied the three-part test outlined in its *Arrow* decision (Pet. App. 26a):

> In determining whether bad faith or subterfuge is involved, the Commission and courts generally look to the reasonableness of the carrier's manner of operations, as evidenced by: (1) the degree of circuity involved in the interstate route when compared with routes of intrastate carriers; (2) the presence or absence of economic or operational [justification] for such routing apart from a carrier's potential lack of intrastate authority or, if relevant, desire to transport otherwise unavailable traffic; and (3) the relationship of the traffic which would otherwise be intrastate traffic to the carrier's overall operations. No single factor is controlling, nor is there any presumption in favor [of] or against any one.

The ICC applied each of those criteria to the particulars of Hover's operation.

i. The ICC noted that circuity "does not play a major role in evaluating whether a LTL carrier's operation * * * is reasonable and logical," since "a circuitous operation through a consolidated terminal can be more logical and efficient than a more direct operation" and "as a matter of economic and practical necessity, LTL traffic generally must be handled through terminals for consolidation and break-bulk, notwithstanding that this often results in circuitous routing." Pet. App. 26a-27a; see *id.* at 27a n.2 (noting the increasing use of "hub" operations in truck-

ing, air freight, and air passenger service).[3] The ICC found that the appropriate circuity factor for Hover's operation was 24.2%, a figure well below those the ICC had found acceptable in prior cases. *Id.* at 27a. In determining the circuity of Hover's operation, the ICC included all traffic moving to or from Hover's Michigan terminals (including traffic with origins or destinations outside Michigan). The Commission rejected petitioners' position that the calculation should reflect only Michigan-to-Michigan traffic, explaining that "[b]ecause all traffic moves in the same vehicles to and from South Bend, it is inappropriate to exclude arbitrarily the traffic moving ultimately to or from points outside Michigan." *Id.* at 27a n.3.[4] The ICC concluded that "the circuity of operation experienced by Hover in moving shipments to and from its South Bend break-bulk facility is an ordinary and routine facet of the business of transporting less-than-truckload shipments of general commodities through such a facility." *Id.* at 27a.

ii. With respect to the operational justification for Hover's use of its South Bend terminal, the ICC noted that it had "recognized repeatedly that operat-

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[3] The abbreviation "LTL" refers to freight shipped in lots smaller than a single truckload. Pet. App. 19a. Carriers handling such freight must attempt to combine and route shipments in a manner minimizing their overall costs.

[4] Under the ICC's analysis, all freight originating in *or* destined for Michigan terminals travelled 24.2% farther than it would have if it had been shipped directly, without passing through South Bend. A study conducted by MPSC in March 1988 showed that the subcategory of freight originating in *and* destined for terminals in Michigan had a circuity factor of 92%. In other words, as a result of being routed through South Bend, that freight travelled 92% farther than it would have if shipped directly. Pet. App. 21a-22a & n.1.

ing through a consolidation terminal is a reasonable manner of transporting LTL, general-commodity traffic, even when it involves moving single-State traffic through a terminal in another State." Pet. App. 28a. The Commission found that "the South Bend location for [Hover's] facility is a logical choice considering the fact that Hover's operations encompass the six-State area of Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan" and that "South Bend is centrally located in this area." *Ibid.* The Commission thus rejected petitioners' contention that Hover's sole purpose in moving its headquarters to South Bend was to avoid Michigan regulation. The ICC found that a statement by Hover's principal to a reporter that the move would enable Hover to serve Michigan without obtaining MPSC authority for intrastate transportation "does not form any basis for us to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation." *Id.* at 29a. The ICC added that "[i]n any event, motivation is not relevant * * * because the criteria set forth in *Arrow*, *supra*, have been met." *Ibid.*

Hover's operation, the ICC continued, was "a logical solution for a carrier that has relatively light volumes of freight moving between most of its individual terminals." Pet. App. 29a. Referring to evidence concerning the small volumes of freight moving between any two terminals in Michigan, the ICC found that "[d]irect over-the-road movements between individual terminals generally would not be economically feasible." *Ibid.* By contrast, the ICC continued, the system in place "gives Hover the advantage of scale economies generated *both* by the aggregation of traffic moving between Michigan terminals and with the much larger volume of traffic mov-

ing between these terminals and points outside of Michigan" and "allows Hover to provide overnight service on much traffic that would not otherwise receive it." *Ibid.* The ICC concluded that "Hover's use of its South Bend facility is a reasonable, logical, and normal way of handling LTL traffic." *Ibid.*[5]

iii. Finally, with respect to the relative significance of the single-state traffic involved in Hover's operation, the ICC found that single-state shipments constituted 9.94% of Hover's system-wide shipments. This figure, the ICC noted, was well below the comparable figure in another case in which it had sustained a carrier's position that freight was not being routed to evade state regulation. Pet. App. 30a.

3. By a 2-1 vote, the court of appeals upheld the Commission's decision in an unpublished opinion.

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[5] Hover presented evidence that its system is typical of LTL freight carriers, whose operational effectiveness depends more on keeping overall costs low than on limiting the number of miles any particular shipment travels. Pet. App. 24a. According to that evidence, use of a central terminal facility as a hub for agency terminals allows Hover to maintain control over all of its shipments at that facility; to base all of its vehicles there; to centralize paperwork, dispatch, and other shipment responsibilities in its headquarters; to dispatch freight to each of its agency stations each night (rather than having to hold it in cases where there was insufficient freight moving between particular stations); and to avoid low freight density between individual terminals. *Id.* at 23a-24a. According to Hover's evidence, the average amount of freight moving between any two of its Michigan terminals each night ranged between 1,000 and 7,500 pounds; the average two-way flow between South Bend and each Michigan terminal ranged between 30,000 and 80,000 pounds. *Id.* at 24a. The net result of the use of the South Bend facility, according to Hover's evidence, is a reduction both in the total vehicle miles travelled and the number of vehicles operated. *Ibid.*

Pet. App. 1a-16a. The majority observed at the outset that the ICC "was well within its jurisdiction" in regulating transportation between two points in a State through another State; the majority explained that the ICC's jurisdiction is not limited to situations in which that regulation would not interfere with a State's regulation of intrastate commerce. *Id.* at 5a.

With respect to petitioners' contention that Hover had employed its South Bend terminal in bad faith to evade state regulation of Michigan-to-Michigan freight, the majority held that there was substantial evidence supporting the ICC's conclusion that Hover's operation passes muster under the three-part *Arrow* analysis. Pet. App. 7a. Rejecting petitioners' contention that the Commission had misapplied the circuity factor of that analysis, the majority explained that "it is logical that the importance of the circuity factor should vary in inverse proportion to the strength of the economic or operational justification of the routing"; that "[s]poke-and-hub traffic patterns often improve efficiency by decreasing unused capacity"; and that "the ICC has long recognized that the use of such patterns may promote the efficient movement of less-than-truckload-lot shipments of freight." *Ibid.* The majority reviewed the pattern of freight moving within Hover's system and found "no basis for rejecting the Commission's conclusion that the spoke-and-hub system was more efficient overall." *Id.* at 8a.

Finally, the majority rejected petitioners' contention that the ICC had overlooked direct evidence of bad faith. Although "given pause" by the ICC's observation that motivation was irrelevant in light of Hover's showing under the *Arrow* criteria (Pet. App. 8a), the majority determined that the ICC had in fact considered the relevant evidence. The court concluded

that "it was within the Commission's province to find" that this evidence of motivation was not dispositive (*id.* at 9a). The majority was thus unwilling to disturb the ICC's decision to "giv[e] the apparent efficiency of Hover's operations more weight than the direct evidence of bad faith." *Ibid.*

Judge Wellford concurred in part and dissented in part. He would have remanded to the Commission for further consideration of the issue of circuity and petitioners' evidence regarding motivation. Pet. App. 9a-16a.

ARGUMENT

1. The basic principles applicable to this case are well established. The ICC exercises exclusive jurisdiction over motor carriage in interstate commerce, including transportation between points in a single State through a second State. 49 U.S.C. 10521 (a)(1)(B).[6] Within the scope of its jurisdiction, the Commission's authority is plenary. The statute establishes "a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. * * * No power at all was left in the states to determine what carriers could or could not operate in interstate commerce." *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 63 (1954). Cf. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (Interstate Commerce Act designed to achieve uniformity of regulation). When a carrier is operating under an ICC certificate of convenience and necessity, the Commission has primary jurisdiction to

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[6] See, *e.g.*, *Jones Motor Co.* v. *United States*, 223 F. Supp. 835, 836 (E.D. Pa. 1963) (three-judge court), aff'd per curiam *sub nom. Highway Express Lines, Inc.* v. *Jones Motor Co.*, 377 U.S. 217 (1964); *Tri-D Truck Lines, Inc.* v. *ICC*, 303 F. Supp. 631, 634 (D. Kan. 1969) (three-judge court).

determine whether particular transportation is interstate in character and thus authorized by the certificate. *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959). A State that believes that a carrier's operation "is not bona fide interstate but is merely a subterfuge to escape its jurisdiction" is required to commence a complaint proceeding before the ICC to enable the Commission to determine whether the carrier has abused its certificate. *Id.* at 179.

Thus, contrary to petitioners' contention (90-926 Pet. 11-18; 90-966 Pet. 8-9), this case presents no substantial issue regarding the division of state and federal authority in this area. The statute and this Court's decisions make clear the extent to which the ICC exercises exclusive jurisdiction and the procedures for resolving disputes as to the applicability of state and federal regulatory schemes to motor carriage. In particular, there is no conflict between the court of appeals' decision and *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). In that case, the FCC sought to regulate the depreciation of equipment that was concededly used in *intra*state telephone communication. In construing the Federal Communications Act to reserve that area to the State, the Court did not suggest any limit on the Commission's authority over *inter*state communication, the analogue of the ICC authority at issue here. See *Texas* v. *United States*, 866 F.2d 1546, 1553 (5th Cir. 1989). As the court of appeals noted, this case presents only the question whether the Commission's application of an established construction of the ICC's governing statute to the particular facts of this case should be upheld under applicable standards of judicial review.

2. As noted, the Commission and the courts have recognized a narrow exception to the Commission's

authority over interstate motor carriage for cases in which a shipment "[is] not in good faith but was a mere subterfuge to evade the state's requirement as to intrastate commerce." *Eichholz* v. *Public Service Comm'n*, 306 U.S. 268, 274 (1939). The burden of establishing the applicability of that exception is on the party challenging the Commission's jurisdiction. *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, *supra*; *Missouri Public Serv. Comm'n* v. *Missouri Arkansas Transp. Co.*, 103 M.C.C. 641 (1967). In assessing such claims, the Commission routinely employs the three-factor *Arrow* analysis that it applied in this case.

The Commission's determination that Hover's operation was not a mere subterfuge to avoid Michigan's regulation of intrastate commerce was fully justified by the administrative record. Contrary to petitioners' suggestion (90-926 Pet. 3-4; 90-966 Pet. 3-4), there was substantial evidence that Hover had relocated its headquarters for reasons other than avoiding Michigan regulation. The ICC found that "the South Bend location for [Hover's] facility is a logical choice considering the fact that Hover's operations encompass the six-State area of Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan" and that "South Bend is centrally located in this area." Pet. App. 28a. Petitioners' attempt to link the relocation to Hover's acquisition of ICC authority to operate interstate is unpersuasive. As the Commission noted, the company's relocation from Michigan to much large quarters in South Bend took place against the background of its evolution from a small, primarily interline carrier operating in parts of Michigan and Indiana into a far larger single-line carrier operating in six States. See *id.* at 18a.

Likewise, the record supports the Commission's conclusion that Hover's method of operations—under which LTL shipments are sent from agency terminals to South Bend and routed back to those terminals—is "a reasonable, logical, and normal way of handling LTL traffic." Pet. App. 29a. A central or regional consolidation and break-bulk facility is a routine feature of LTL operations the ICC has upheld against similar challenges. See *Missouri Pub. Serv. Comm'n* v. *Missouri-Arkansas Transp. Co.*, 103 M.C.C. at 641. See also *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. at 176.[7] In this case, the Commission found that Hover "lacks sufficient freight volume between its Michigan terminals to establish a system of regular direct runs betwen those terminals" and that the carrier's hub-and-spokes system yields significant economies of scale. Pet. App. 29a. Of course, the fact that such a system sometimes results in quite circuitous routings—a fact on which the intervenor-petitioners place great emphasis (90-966 Pet. 5-6, 18-19)—does not undermine the system's overall economic justification.

Although petitioners do not question the general validity of such a system, they find fault with two aspects of the ICC's analysis of the record in this case. Petitioners argue that the Commission improperly refused to consider so-called "direct evidence of bad faith" and misapplied the circuity factor of the *Arrow* analysis. 90-926 Pet. 5-11; 90-966 Pet. 12-24. Neither contention presents an issue warranting this Court's attention.

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[7] Indeed, other sectors of the transportation industry, most notably air carriers (moving freight as well as passengers), have increasingly adopted "hub" operations to increase traffic density and lower overall costs.

a. The ICC did not ignore evidence proffered by petitioners. After describing a statement by Hover's principal to a reporter to the effect that the move to South Bend would enable Hover to serve Michigan without authority from that State, the ICC found that this statement "does not form any basis for us to conclude that the operation is not authorized or even that the purpose of the move was to avoid [Michigan] regulation." Pet. App. 29a. Given the regulatory background, it is a fact that a move to South Bend for bona fide business reasons would have the effect of allowing Hover to serve Michigan by means of its established pattern of operations without intrastate authority. It does not follow, as petitioners suggest, that the move must necessarily have been motivated by a desire to evade state regulation. As the court of appeals explained, "[w]here the move is adequately justified on economic grounds, we cannot say that the ICC was required to find bad faith because Hover recognized the regulatory consequences as well." *Id.* at 9a.[5]

Petitioners place great emphasis on the Commission's additional observation that the evidence of motivation was not relevant "[i]n any event" (Pet.

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[5] The intervenor petitioners also highlight evidence that Hover made some unlawful direct shipments between Michigan terminals. However, Hover submitted evidence that it has established procedures to ensure that such shipments are not repeated (Pet. App. 25a), and the issue in this case is whether those shipments that did go to South Bend were routed there as part of a subterfuge to avoid state regulation. The significance due this evidence was an issue for the Commission; its assessment presents no question calling for this Court's review. See *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. at 312 (even past unsuccessful attempts to obtain intrastate authority did not warrant a finding of subterfuge for interstate routing).

App. 29a) in view of the showings that had been made in this case on the three *Arrow* factors. In context, however, that observation was at most an alternative ground for the Commission's refusal to base a finding of bad faith on petitioners' limited evidence of motivation. The Commission has not indicated that it will refuse to consider such evidence in a case in which there is room for doubt as to the bona fides of a carrier's operations. This Court's review is not warranted to address a statement in the Commission's opinion which—the opinion makes clear—had no effect on the result.

Michigan argues that, in *Service Storage & Transfer Co.* v. *Virginia*, *supra*, this Court has held that direct evidence of bad faith is controlling and that the three *Arrow* factors may be considered only in the absence of such evidence. 90-926 Pet. 7 & n.2. The Court's opinion says no such thing. See 359 U.S. at 175, 177. Indeed, since the only question decided in *Service Storage* was whether a claim of bad-faith routing should be presented to the Commission in the first instance, this Court had no occasion to consider the standards governing such claims. Moreover, a rule barring resort to the *Arrow* factors in cases of this type would be unjustifiable. Showings of the sort made by Hover in this case—that a carrier's operation is economically justified, that routings are not unduly circuitous, and that the carrier's single-State business accounts for a small percentage of its overall business—go directly to a claim that the carrier has structured its operations to evade state regulation.

b. Circuity of routing does not establish subterfuge where there is a legitimate purpose for such routing. *Gray Line Tour Co.* v. *ICC*, 824 F.2d 811, 815 (9th Cir. 1987) (involving tour bus operation).

Indeed, where LTL traffic is concerned, a circuitous operation through a consolidation terminal can be more efficient than a direct operation. *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. at 306. Thus, the proper measure of the circuity of a carrier's routings and the significance of this factor are matters within the expertise of the ICC.

The ICC's analysis of the circuity of Hover's routings was fully justified. Under Hover's system, trucks moving from each agency terminal in Michigan to South Bend carry shipments destined for other points in Michigan and for points in other States, and trucks moving from South Bend to a Michigan agency terminal carry shipments from other points in Michigan and from other States. In evaluating the justification for Hover's overall system, it was therefore reasonable for the Commission to aggregate all such shipments in determining the circuity of Hover's operation.[9] There is no merit to petitioners' contention (90-926 Pet. 8-11; 90-966 Pet. 20-22) that *Service Storage & Transfer Co.* v. *Virginia, supra*, and *Eichholz* v. *Public Service Comm'n, supra*, require the Commission to adhere to any particular analysis of the issue of circuity. Neither case addressed that question.

3. Although Michigan's petition does not present the question whether the Commission's procedures were deficient (90-926 Pet. i), Michigan argues that it should have received a "formal hearing" (*id.* at

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[9] See *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. at 311 (where routings for single-state shipments through another state are similar to those used for multi-state shipments, they are not contrived or especially designed to attract normally intrastate traffic).

19-21). In this case, the Commission was operating under authority of a statutory provision, 49 U.S.C. 11701, that does not require the Commission to reach a decision on the record after an agency hearing. Thus, the APA requirements triggered by such a requirement were inapplicable. 5 U.S.C. 554(a).

The Commission heard this case in accordance with "modified procedures"—under which evidence is submitted in written form—that the ICC regularly employs in cases in which "it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony." 49 C.F.R. 1112.1. These procedures assure parties a fair hearing, and their sufficiency has been upheld in other proceedings conducted under provisions that do not trigger the APA. *Trailways, Inc.* v. *ICC*, 681 F.2d 252, 253-254 (5th Cir. 1982); *Crete Carrier Corp.* v. *United States*, 577 F.2d 49, 50 (8th Cir. 1978). Cf. *United States* v. *Florida East Coast R.R.*, 410 U.S. 224 (1973).

Michigan's petition does not identify any specific respect in which the State was prejudiced by the absence of an oral hearing. It also failed to state with specificity why such a hearing was necessary in its reply statement filed with the ICC, as required by the relevant Commission rule. 49 C.F.R. 1112.10.[10] Fi-

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[10] That regulation states:

> Requests for oral hearings in matters originally assigned for handling under modified procedure should be included in the reply or rebuttal statement. The reasons why the matter cannot be properly resolved under modified procedure must be set out in full. Requests for cross examination of witnesses must include the name of the

nally, the record forecloses any claim that the absence of an oral hearing denied Michigan an opportunity to establish its claim. In its written submissions, Michigan was able to confront the facts on which Hover relied to establish the legitimacy of its operation. Hover's principal was subjected to cross-examination in a prior state proceeding, and the record of that proceeding was before the Commission here. 90-966 Pet. 19. Indeed, the intervenor-petitioners emphasize—referring to various sources of information before the ICC in this case—that "[t]his record is complete." *Ibid.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1991

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witness and the subject matter of the desired cross examination.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20363

Nos. 90-926, 90-966

FILED
FEB 25 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

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ALVAN MOTOR FREIGHT, INC.;
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Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,

Respondents,

and

HOVER TRUCKING COMPANY OF MICHIGAN,

Respondent-Intervenor.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITIONERS' RESPONSE TO BRIEF OF RESPONDENTS HOVER TRUCKING COMPANY AND FEDERAL RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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ARGUMENT

A. The ICC Did Ignore the Bad Faith Factor in Order to Expand its Jurisdiction, and Eliminate State Regulation of Intrastate Transportation.

The Federal Respondents do not dispute the proposition, advanced by Intervenors, that the ICC has publicly proclaimed to Congress that continued state economic regulation of for-hire truck transportation is counterproductive, and totally at odds with the preferable "Brave New World" of unfettered competition which the ICC has overseen during the 1980's in this industry. This agency has proudly announced to Congress that it has done all that it can, to contract state regulation, and urged the legislature to take the ultimate step – preempt intrastate regulation. As Congress has refused to take this step, the agency has been left to creative expansion of its jurisdiction vis-a-vis the states, to fulfill the ICC's own deregulation agenda. That is what has occurred in the *Hover* case, no matter what gloss the Federal Respondents seek to place upon it.

This can best be seen in the strained analysis presented by Respondents on the bad faith issue. Again and again, bad faith evidence, or the lack thereof, was pointed to as the critical factor, by both the ICC itself and the reviewing courts. Yet, in this case, the ICC stated that "bad faith" was no longer important, as long as the criteria established in *Pennsylvania Public Utilities Commission v. Arrow Carrier Corporation*, 113 MCC 213 (1971), aff'd *per curiam* 415 U.S. 902 (1974), are met. There is no case which supports this proposition, including those very cases brazenly cited by the Federal Respondents in their Brief in Opposition.

The case of *Rock Island Motor Transit Company v. Watson-Wilson Transportation System*, 99 MCC 303 (1965), aff'd *sub. nom. Rock Island Motor Transit Co. v. United States*, 256 F.Supp. 812 (S.D. Iowa, 1966), heavily relied upon by

Respondents, is most instructive on this issue. In *Rock Island*, the ICC stated, at 99 MCC 316, that:

> Nor does *any* other evidence point to subterfuge. Indeed, it points the other way. As nearly as we can tell from this record, the operation was begun innocently more than a generation ago, with no subterfuge intended on (Respondent's) part and none feared by petitioners or intervenor. (Emphasis supplied).

This Hover operation was not begun a generation ago. It was begun in 1983, when Hover was not "a far-larger single-line carrier operating in six states" (Federal Respondents' Brief, 12)[1]. Hover never established that it had these operations when it moved about ten miles from Niles, Michigan to South Bend, Indiana. Further, with regard to the ICC's conclusion that South Bend was a logical choice, given the six-state area (Federal Respondents' Brief, 12), that area had nowhere near the level of Hover service in 1983, when its decision was made. Further, it moved about ten miles. Niles, Michigan is just as logical as South Bend, Indiana, even assuming a six-state area of operations. The move was made by Hover to avoid Michigan regulation. Hover's Michigan activity remains the important financial center of its operations. Bad faith was an issue in *Rock Island*. There was no evidence of bad faith presented there. On the other hand, the instant record is rife with evidence of bad faith.

On review, in *Rock Island, supra*, the three-judge district court differentiated the facts before it with other proceedings where a subterfuge had been established, by noting that bad faith present in the other proceedings was

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[1] Hover cannot be described as a single-line carrier in any event. Much of its traffic is handled on an interline basis with other carriers, and even picked up and delivered on its own line by agents possessing their own ICC authority.

not present in the facts before the ICC[2]. The Iowa-to-Iowa shipments in *Rock Island*, further, were only a minute fraction (less than 1%) of the traffic handled by the involved carrier from the questioned Iowa points, including both intrastate and interstate traffic[3]. The same is not true here.

In *Missouri Public Service Commission v. Missouri Arkansas Transportation Company*, 103 MCC 641 (1967), again cited in Federal Respondents' Brief at 12, the ICC again relied heavily on the absence of direct evidence of bad faith. As was there stated, at 103 MCC 646.

> If defendant's actual routing and method of handling the considered traffic originating at or destined to a point in Missouri through Kansas, although for its convenience, appears operationally reasonable, *and absent evidence from which we can independently infer bad faith on defendant's part*, we have no alternative but to decide this question in its favor. (Emphasis supplied).

The ICC emphasized that "*no facts*" had been established from which bad faith could be inferred. See 103 MCC at 647 (Emphasis supplied).

Other cases cited by the Federal Respondents held similarly. In *Jones Motor Co. v. United States*, 218 F.Supp. 133 (E.D. Pa. 1963) petition for reh. den., 223 F.Supp. 835, aff'd *sub. nom., Highway Express Lines v. Jones Motor Co.*, 377 U.S. 217, 84 S.Ct. 1244, 12 L.Ed.2d 292 (1964), the three-judge district court noted initially at 218 F.Supp. 137 that:

> *no direct evidence of bad faith* was offered by the P.U.C. (Emphasis supplied).

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[2] 256 F.Supp. at 817.

[3] 256 F.Supp. at 816, n.5.

The lack of evidence of bad faith, in denying the rehearing, was again underscored[4]. In still another case, *Tri-D Truck Lines, Inc. v. ICC*, 303 F.Supp. 631 (D. Kan, 1969), the three-judge district court analyzed the evidence in detail, in order to conclude that there was no bad faith on behalf of the respondent carrier.

The Federal Respondents continue to ignore all of this language, as well as the emphasis of bad faith in those several cases which found that a carrier had abused its ICC certificate[5]. All of this language is ignored by Federal Respondents. It is overlooked, precisely because the decision below cannot be squared in any respect with these past cases, including, most importantly this Court's decision in *Service Storage & Transport Co., Inc. v. Virginia*, 359 U.S. 171, 175, 79 S.Ct. 714, 3 L.Ed.2d 717 (1959), wherein it was written by Justice Clark, for a unanimous Court, in commenting on the Commonwealth of Virginia's case,

> However, it offered *no direct evidence of bad faith* on the part of petitioner in moving its traffic through Bluefield, West Virginia. (Emphasis supplied).

Yet, the ICC, in the *Hover* case, considered none of the bad faith evidence as outlined by Intervenors in their Petition, other than the statement by Hover's President to a newspaper reporter that, through moving its facilities to

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[4] 223 F.Supp. at 236.

[5] *Service Trucking Company, Inc. Petition for Declaratory Order*, 94 MCC 222, 225-226 (1963), aff'd *sub. nom., Service Trucking Co. v. United States*, 239 F.Supp. 519 (D.Md., 1965), aff'd 382 U.S. 43, 86 S.Ct. 183, 15 L.Ed.2d 36 (1965); *Pennsylvania Public Utility Commission v. Leonard Express*, 107 MCC 451, 459-463 (1968), aff'd *sub. nom., Leonard Express, Inc. v. United States*, 298 F.Supp. 556 (W.D.Pa., 1969); and *Haley, Public Utility Commissioner of Oregon v. City Transfer & Storage Co.*, 112 MCC 80, 92-94 (1970).

South Bend from Niles in 1983, Hover could serve the State of Michigan without holding authority from the MPSC (Intervenors' Appendix, 14a). Even that motivational statement was cavalierly dismissed by the ICC, with the comment that:

> In any event, motivation is not relevant here because the criteria set forth in *Arrow, supra,* have been met.

(Intervenors' Appendix 25a-26a). The ICC's rejection of bad faith, as a factor, when the *Arrow* test has been fulfilled cannot be reconciled in any respect with the earlier statement by this Court in *Service Storage* as well as other federal court and ICC pronouncements on the analysis of these issues.

This ruling in *Hover,* was more than a throw-away line, or, as Federal Respondents assert here, "an alternative ground." Federal Respondents' Brief, 15. It is telling of the ICC's jurisdictionally expansionist analysis of all of the evidence here – if the evidence detracted from a finding that the Hover traffic was interstate in nature, it was not considered.

For example, the ICC did not consider the fact that Hover transported this traffic directly between Michigan points in normal routine operations without involving South Bend, until it was apprehended. Only after being caught was this practice discontinued. This establishes bad faith, just as the submission of a false affidavit by Hover's President to the MPSC in the state complaint proceeding establishes bad faith. He indicated in that affidavit that all traffic was moving through South Bend, when Hover later admitted that such traffic was not moving through South Bend on a "normal, routine" basis. The ICC did not consider these critical factors, unnecessary in its view, because the *Arrow* factors had been met. This is a tortured application of past precedent.

The handling of this Michigan traffic directly by Hover is vitally important. It was more than "some" traffic. Federal Respondents' Brief, 14, n.8. Also, Hover

established procedures to prevent this, only as part of the resolution of a complaint proceeding brought against it by the MPSC. Moreover, Hover has manipulated these procedures, so that it can serve Michigan points only 23 miles distant (Detroit and Pontiac, a northern Detroit suburb) through South Bend when Hover's Pontiac and Detroit terminals have peddle runs longer than 23 miles themselves. The ICC gave the bad faith evidence no significance, because it had ruled the bad faith factor out of existence. This was not justified under *Service Storage* or any other past precedent. It was this flawed analysis by the ICC that lead Judge Welford to comment, in dissent below that:

> I am at a loss to understand this part of the ICC's conclusions in this controversy. Evidence of bad faith is, indeed, highly relevant to any ultimate determination of subterfuge to circumvent legitimate state regulation.

(Intervenors' Petition, 15a). Even the majority below was "given pause" by the ICC's treatment of bad faith. (Intervenors' Petition, 8a). Contrary to the majority's conclusion, however, the ICC did not consider all of the bad faith evidence, as the ICC commented only on the admission to the newspaper reporter, and not on the myriad of other facts establishing bad faith (Intervenors' Petition, 17-19). The decision of the ICC was crafted with one end in mind – to establish ICC jurisdiction over the Hover traffic. It should not be allowed to trample upon the facts and the law, to interfere with what is still a legitimate state function, the economic regulation of intrastate truck transportation.

B. The Arrow Analysis by the ICC Below was also Novel, and Designed to Approve Virtually any Less-Than-Truckload Operation Conducted Under an ICC Certificate Through a Point in Another State.

The Federal Respondents contend that the ICC properly analyzed the facts of this case, in line with *Arrow, supra.* (Federal Respondents' Brief, 13, 15-16). What the ICC did, however, was once again shove the Hover facts into an *Arrow* vessel in which they do not fit.

On the issue, for example, of operational justification, the ICC did not take into account the past Hover direct routings which avoided South Bend. The ICC never addressed the question of why Hover moved LTL traffic directly between its Michigan terminals on a "normal, routine" basis. The question was avoided, because the answer is necessarily at odds with the ICC's ultimate conclusion below. The answer is that Hover made the clear judgment in the past that the routing of such traffic through South Bend was unnecessary, and not reasonable, logical and normal. It made sense, from an operational and economic standpoint, to leave this traffic on a normal, routine basis in Michigan, and route line-hauls directly between the Hover Michigan terminals, all capable of processing LTL traffic. Instructions were given to Hover personnel in Michigan to route traffic directly on a normal, routine basis. This admission by Hover that the South Bend routing was illogical was not considered by the ICC. Neither was other evidence considered, such as alternative, available methods of tying the Hover Michigan facilities together with simple line-haul routings which would take advantage of load factors on Michigan traffic; or the economic analysis of Intervenors' expert Mr. Glenn Fast that Hover's routings through South Bend were costly and inefficient. The ICC was not distracted by the facts from its ultimate goal of finding that the Hover handling of Michigan-to-Michigan freight was interstate in nature.

Along these very lines, it was necessary for the ICC to concoct a new circuity test, and consider traffic not at issue in this case, so that the circuity factor could be reduced to a level that the ICC could brush aside as inconsequential. Unlike *Gray Line Tour Co. v. ICC*, 824 F.2d 811 (9th Cir., 1987), cited by Federal Respondents, these packages receive no aesthetic benefit from visiting a freight dock in South Bend, Indiana. These shipments could be handled similarly on a direct basis at Hover's extensive (and ever-growing) network of terminal facilities in Michigan, as such shipments were handled directly by Hover in the past on a normal, routine basis. A new circuity method of analysis had to be devised by the ICC in this case, because never before had it considered a scheme of the magnitude confronted in this case, involving as it does Hover service on Michigan-to-Michigan traffic for the entire lower peninsula.

Recognizing also that it was considering non-issue traffic to reduce the circuity numbers, the ICC felt constrained to say that circuity was not important anyway, when analyzing LTL freight operations. Neither *Rock Island* nor any other past case supports this proposition. For the ICC, as an administrative agency, to depart from past tests, it must articulate clearly its reasons for that departure, as opposed to merely ignoring the plain language of its past decisions and those of the courts, as it has done in this case.

Circuity is a major factor in analyzing LTL operations, as well as in other cases. As the ICC itself stated in *Arrow, supra*, at 113 MCC 220, "No single factor is controlling. Nor is there any presumption in favor or against any one". *Arrow* involved an analysis of LTL freight. The ICC changed the rules below, not only on bad faith, but on circuity. It did so, to expand its jurisdiction, vis-a-vis the states. This is an unjustified course of action, unauthorized by any legal theory.

CONCLUSION

The issue in *Hover* before the ICC was not whether its regulatory policies were more intelligent than those of the State of Michigan. The issue was whether the respondent carrier had unlawfully used its ICC certificate as a subterfuge in providing a service on traffic having both a Michigan origin and Michigan destination. Further, the ICC should have analyzed the facts below in accordance with past precedent of this Court, other federal courts, and the Commission itself. It did not do so. That the ICC is convinced of the wisdom of its de-regulatory policies is made clear, by cases such as *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 111 L.Ed.2d 94, 58 U.S.L.W. 4862 (1990). That does not mean that the regulatory course chosen by the ICC is legally justified, however, as this Court noted in *Maislin*. It is up to Congress, and not the ICC, to expand ICC jurisdiction over intrastate transportation if that is to come. The ICC must not be allowed to expand its jurisdiction in the fashion which it has here. Petitioners pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

Date: February 25, 1991

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